STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

ETRE ASSOCIATES, LTD

and

MARC ETRE
as one of the five largest shareholders of
ETRE ASSOCIATES, LTD
Prime Contractor – Respondent

and

MERCANDO CONTRACTING CO., INC.
and
FRANK J. MERCANDO and WILLIAM MAZZELLA
as officers and two of the five largest shareholders of
MERCANDO CONTRACTING CO., INC.
and
MERCANDO INDUSTRIES, LLC,
as a substantially owned-affiliated entity
Subcontractors – Respondents

A proceeding pursuant to article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

REPORT & RECOMMENDATION

Prevailing Rate Case
97-6619 Westchester County

IN THE MATTER OF

THE LOSCO GROUP, INC.
and
MICHAEL R. LOSCO
as one of the five largest shareholders of
THE LOSCO GROUP, INC.
Prime Contractor – Respondent

and

MERCANDO CONTRACTING CO., INC.
and
FRANK J. MERCANDO and WILLIAM MAZZELLA
as officers and two of the five largest shareholders of
MERCANDO CONTRACTING CO., INC.
and
MERCANDO INDUSTRIES, LLC,
as a substantially owned-affiliated entity
Subcontractors – Respondents

A proceeding pursuant to article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

Prevailing Rate Case
98-8963 Westchester County

IN THE MATTER OF

L. J. COPPOLA, INC.,
and
LOUIS J. COPPOLA
as one of the five largest shareholders of
L. J. COPPOLA, INC.
Prime Contractor – Respondent

and

MERCANDO CONTRACTING CO., INC.
and
FRANK J. MERCANDO and WILLIAM MAZZELLA
as officers and two of the five largest shareholders of
MERCANDO CONTRACTING CO., INC.
and
MERCANDO INDUSTRIES, LLC,
as a substantially owned-affiliated entity
Subcontractors – Respondents

A proceeding pursuant to article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

Prevailing Rate Case
99-3213 Westchester County

To: Honorable Peter M. Rivera
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter (H.O. Ex. 1), and following several adjournments of the originally scheduled hearing dates (H.O. Exs. 4, 5, 6, 7), a hearing was commenced on September 20, 2007, in White Plains, New York, at which time the hearing was adjourned to November 29, 2007, when testimony commenced. The hearing continued thereafter for 54 additional days, concluding on March 27, 2012, by videoconference between Albany and White Plains (videoconferencing having begun on February 10, 2011). 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. Following the conclusion of the hearing, the parties were afforded the opportunity to submit Proposed Findings of Fact and Conclusions of Law ("Proposed Findings") and Replies to their respective Proposed Findings.

The New York State Department of Labor ("Department"); Mercando Contacting Company, Inc. (“Mercando”) and Frank J. Mercando; and The Losco Group (“Losco”) and Michael R. Losco, served their respective Proposed Findings on or about July 30, 2012. Thereafter, Mercando and Losco served Replies to the Department’s Proposed Findings, the last of which was received from Mercando on September 12, 2012.

The cases involving the Prime contractors Etre Associates, Ltd. (“Project 1”) and L. J. Coppola, Inc. (“Project 3”) settled during the course of the hearing. The remaining case concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the Department into whether Mercando, a subcontractor of Losco, complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a contract involving the construction of a new elementary school in Yonkers, New York (“Project 2”) for the Yonkers Public School District.

APPEARANCES

The Bureau is represented by Department Counsel, Pico Ben-Amotz (Marshall H. Day, Senior Attorney, of Counsel). Initially, Mercando appeared with its attorney, Michael R. Fleishman, Esq., of Goetz, Fitzpatrick, LLP and Losco appeared by and through its attorneys, Andrew Greene & Associates, P.C. (Samuel D. Friedlander, Esq., of Counsel). Following a suspension in the hearing after November 30, 2007, during which settlement discussions were untaken, Mercando and Losco appeared pro se, with Frank J. Mercando and Michael R. Losco representing their respective companies, commencing with the September 24, 2008 hearing.

ISSUES

1. Did Mercando pay the rate of wages or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?
2. Was any failure by Mercando to pay the prevailing rate of wages or to provide the supplements prevailing in the locality “willful”?
3. Did any willful underpayment involve the falsification of payroll records?
4. Is Mercando Industries, LLC a “substantially owned-affiliated entity” of Mercando?

5. Were the employee leasing companies PEO Services Inc. and PEO Services of Northeast Inc. “employers” of Project 2 workers responsible for compliance with Labor Law article 8, and, if so, were they “joint-employers” with Mercando?
6. Is Frank J. Mercando one of the five largest shareholders of Mercando?
7. Are Frank J. Mercando and William Mazzella officers of Mercando who knowingly participated in a willful violation of Labor Law article 8?
8. Should any period of the time for which interest would otherwise be assessed on any underpayments of prevailing wages and/or supplements be reduced?
9. Should a civil penalty be assessed and, if so, in what amount?
10. Is Losco, as prime contractor on Project 2, responsible for the underpayment, interest and civil penalty determined due?

FINDINGS OF FACT

The hearing initially concerned three separate investigations made by the Bureau on three separate projects involving public work performed by Mercando. The first captioned matter, involving Etre Associates, Ltd. as prime contractor, PRC Case No. 97-06619, referred to herein as Project 1, involved the construction of a library and multi-media center and classroom renovations at the Eastchester High School in Eastchester, New York. The second captioned matter, involving Losco as prime contractor, PRC Case No. 98-08963, referred to herein as Project 2, involved the construction of a new elementary school at Cedar Place in Yonkers, New York. The final matter, involving L. J. Coppola, Inc. as prime contractor, PRC Case No. 99-03213, referred to herein as Project 3, involved a mechanical utilities upgrade at the Norwood E. Jackson Correctional Center, Valhalla Campus, in Valhalla, New York. During the course of the hearing, the proceedings involving Projects 1 and 3 were settled by written stipulation between the Department, the prime contractors and Mercando (H.O. Exs. 16, 17). The only remaining matter, which is the subject of this Report and Recommendation, involves Project 2.

Project 2

Cedar Place Elementary School

On or about August 13, 1999, Losco entered into a prime contract with the Yonkers Public School District to construct a new elementary school at Cedar Place in Yonkers, Westchester County, New York (Dept. Exs. 17, 18). The bid proposal, project manual, specifications and contract specified that the Project was a public work project subject to prevailing wage rates (T. 806-810; Exs. 17, 18).

Thereafter, on or about September 1, 1999, Losco entered into a subcontract with Mercando to perform masonry work on the Project (Resp. Losco Ex. 30). The subcontract expressly incorporated the terms of the prime contract and the contract documents and conditions of the contract (which included the prevailing wage notice), and expressly obligated Mercando to perform the work in accordance with New York State prevailing wage rates (Respondent Losco Ex. 30, ¶15.1.3 & Rider 2, ¶18). Mr. Mercando testified that he was aware that Project 2 was a public work project subject to prevailing wage requirements and that Losco provided him with a prevailing rate schedule (T. 1643-1648, 2304-2305). Mercando was principally involved in the building of interior and exterior block walls, which work involved the laying of brick and block, pouring of concrete, mixing of mortar, erecting scaffold, and related masonry tasks (T. 38, 49-50, 96-97, 227-229,441, 446-448, 1637, 1664, 6621-6624, 6627; Dept. Ex. 17; Resp. Losco Ex. 30).

The Bureau issued two Prevailing Wage Rate Schedules ("PRSs") relevant to the work performed on the contract. Effective July 1, 1999, the Bureau issued PRS 1999 for Westchester County, which detailed the amount of wages and supplements that were to be paid or provided to the workers performing work for the period July 1, 1999 through June 30, 2000 (Dept. Ex. 9).[1] Effective July 1, 2000, the Bureau issued PRS 2000 for Westchester County, which detailed the amount of wages and supplements that were to be paid or provided to the workers performing work for the period July 1, 2000 through June 30, 2001 (Dept. Ex. 10).[2]

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[1] PRS 1999 for Westchester included rates for the following relevant classifications: (1) Mason – with wages of $28.80 an hour and supplements of $13.45; (2) Laborers – with wages of $24.90 an hour and supplements of $10.05; and (3) Power Equipment Operator – with wages of $29.35 an hour and supplements of $14.93 (Dept. Ex. 9).

[2] PRS 2000 for Westchester included rates for the following relevant classifications: (1) Mason – with wages of $29.75 an hour and supplements of $13.90; (2) Laborers – with wages of $25.40 an hour (effective May 1, 2000) and supplements of $10.55; and (3) Power Equipment Operator – with wages of $32.49 an hour (effective March 5, 2000) and supplements of $15.48 (Dept. Ex. 10).

Filing of Complaints

The Bureau alleges that on or about November 1, 2000, it received written complaints from Mercando employees alleging, *inter alia*, that Mercando underpaid prevailing wages and supplements on Project 2, and that on the basis of those complaints it commenced an investigation (T. 92-95, 101-103; 111-112, 130; H.O. Ex. 1).

Although it was unable to produce the written claim forms, the Bureau senior investigator, Daniel McCormick, testified that he was present when the claimant's appeared at the Bureau's White Plains offices in 2000, that he provided them with the forms they completed, and that he had copied payroll stubs that they had brought with them (T. 92-95, 101-103; 111-112, 121-122, 130-140). To corroborate that testimony, the Bureau also produced the Bureau's complaint log, which contemporaneously records all complaints filed in the White Plains office, and the Restitution Data Entry forms, which are completed when a new case is entered in the Bureau's computer system, both of which show that the case concerning Project 2 was opened against Mercando on November 1, 2000, based upon complaints filed October 23 and October 24, 2000 (T. 95, 98-102, 112-129; Dept. Ex. 42; *see also*, Resp. Mercando Exs. 4, 27). During the hearing, the three employees who filed written complaints also testified that they originally filed their claims in 2000 and 2001 (T. 341-344 [Andre Morgan], 410-411 [Jackson LaLama], 3232, 3286-3287 [Larry Loggins]). Instead of those original complaint forms, the Bureau introduced complaints from the workers received in 2004 and 2005, more than three years after the work was completed, which the Bureau maintains are follow-up complaints on the originals received in 2000 and 2001 (T. 103-104, 107-11; Dept. Exs. 1A, 1B, 2A, 2B, 3).[3]

Respondents argue that the Department's failure to produce written complaints prior to those received in 2004 evidences that no such complaints existed and that the claims are therefore time barred (*Losco's and Mercando's Proposed Findings of Fact and Conclusions of Law*) (hereinafter "*Proposed Findings*").

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[3] Department Exhibit 2A is a copy of the August 23, 2001 Jackson LaLama complaint resubmitted on October 24, 2004.

The evidence credibly establishes that employee complaints' alleging underpaid prevailing wages and supplements on Project 2 were first received by the Bureau on October 23, 2000, and that the Bureau opened a case on Project 2 in consequence thereof on November 1, 2000.[4]

The Records Request/Withholding

On or about October 19, 2004, the Bureau sent a Payroll Records Request Notice to Mercando, Losco and the Yonkers Public School District, which required Mercando to produce within 10 business days private and public work payroll records, including certified payrolls, together with, *inter alia,* daily time records, cancelled checks for supplemental benefits provided, canceled payroll checks, benefit plan summaries, an IRS benefit plan approval letter, a complete contractor profile, copies of monthly union contribution reports, a copy of the contract to perform work on the project, a list of subcontractors, daily logs and W-2's and W-4's (Dept. Ex 16). Based upon Mercando's failure to produce the records within the required 10-day time period, on or about December 10, 2004, the Bureau issued a withholding notice to the Yonkers Public School District directing it to withhold $100,000.00 on the prime contract (Dept. Ex. 23). Although that request was not acknowledged, the Bureau investigator testified that approximately $100,000.00 is being withheld on the contract as a result of that withholding notice (T. 902).

The Bureau's Underpayment Determination

At some point thereafter, certified payrolls were produced by Mercando, Losco and the Yonkers Public School District (T. 795-796). Prior to the commencement of the hearing, based on the information Mercando provided up to that time, the Bureau initially determined that the Mercando had underpaid 23 workers working in the mason, laborer and power equipment operator classifications $112,442.63 in wages and supplements for the period week-ending

[4] This conclusion is further supported by a copy of a Department Payroll Records Request Notice (PW-18) dated November 9, 2000, which was included in a set of documents sent by Losco's attorney to Mercando's attorney, received in evidence as Mercando Exhibit 18. Payroll Record Request Notifications are typically mailed to the contractor, the prime contractor and the public entity shortly after a file is opened requesting documents necessary to determine whether there was an underpayment of wages and/or benefits on a public work job (T. 1521). Although Mr. Mercando's cross-examination of the Bureau's senior investigator suggests his belief that the document was never sent, as it apparently resulted in neither the production of records nor a withholding for failure to produce those records (T. 1521-1542, *see also*, T. 1549-1557, 1577-1579, 1581-1582 [Mr. Losco's cross-examination along same line]), it nevertheless, at a minimum, shows that the Bureau created the document shortly after the time it is alleges that the complaints were filed, regardless of whether it was actually mailed (although it is difficult to understand how the document was in the possession of Losco's attorney if it was never mailed).

January 23, 2000 through week-ending May 1, 2001 (H.O. 1). Shortly after the hearing commenced in 2007, the hearing was adjourned so that Mercando could provide the Bureau with additional documentation and the parties could engage in discussions concerning modification of the audit. As a result, when the hearing resumed in 2008, the audit had been revised and it substantially lowered the underpayment the Bureau determined due on Project 2 (T. 824-825).

The revised audit, received in evidence December 5, 2008, determined that 16 workers employed by Mercando on Project 2 had been underpaid $52,279.12 for the period week-ending January 23, 2000 through week-ending May 1, 2001 (T. 827; Dept. Exs. 20, 21). In revising the audit, the Bureau utilized, in addition to the certified payrolls (Dept. Exs 19A and 19B), time sheets provided by Mercando (T. 820; Dept. Exs. 41A [Loggins], 41B [Morgan] and 41C [LaLama]) and union benefit reports (Dept. Exs.39A [Operating Engineers], 39B [Laborers], and 39C [Masons]) (T.832). In creating the revised audit, the Bureau relied on the certified payrolls to establish the days and hours worked for those employees who were listed in the certified payrolls (T.843-844). For employees not listed on the payrolls, who happen to also be the complainants, the Bureau relied on the time sheets Mercando provided to establish their days and hours of work (T. 843, 852, 864, 873, 879). One set of the certified payrolls contained worker classifications (Dept. Ex. 19B), and the Bureau accepted the classifications stated for those employees who were listed in the certified payrolls (T. 842). For the employees not listed in the certified payrolls, the Bureau relied on the work descriptions in the employees' complaints and their statements to establish their classifications (T. 842, 856-857, 864). Although the Bureau received no proof of payment of wages, it accepted the wages shown paid in the certified payrolls (T. 845). For the employees not listed in the certified payrolls, the Bureau used the rate of pay the employees claimed they were paid on their complaint forms, one employee's paystubs, and their statements to the Bureau, to establish the wages that they were actually paid (T. 853, 858, 864-865, 870-871, 875-879). Where the Bureau received proof of supplemental payments in the union benefit reports, those benefits were credited, which resulted in some employees being removed from the audit, as those employees received at least the prevailing rate

of wages and supplements required to be paid (T. 845-846).[5] For those employees remaining on the audit, no supplemental benefit credit was provided unless a supplemental benefit payment could be specifically tied to work performed on Project 2 (as opposed to work on other public work projects or on private jobs) (T. 846, 850, 854-855, 865, 867875-876). The Bureau's audit then compared the wages and supplements that should have been paid for the hours of work in the various classifications according to the relevant PRSs against what was actually paid and determined that Mercando had underpaid $52,279.12 in wages and supplements (T. 883-885; Dept. Exs. 20, 21).

During the course of the hearing, employee testimony was adduced, including testimony from the complainants and the foremen of the crews performing the mason and laborer work (T. 333-339 [Morgan], 401-444 [LaLama], 3205-3384 [Loggins], 2620-2707 [Melendez, laborer foreman], 2458-2542 [Armento, mason foreman]). In addition, Robert Boyle testified that he worked as a driver and a laborer on Project 2 (T. 2548-2549, 2558-2561), contrary to Mr. Mercando's assertion that he worked exclusively as a driver (T. 1737). Mr. Boyle's testimony was corroborated by the laborer foreman (T. 2631-2632, 2636-2637, 2663). Messrs. Mercando and Losco were also called by the Department to testify (T. 1601-2354 [Mercando], 3395-3887 [Losco]). Mercando also produced additional payroll records[6] and daily logs (T. 3510-3521; Dept. Exs. 81, 82, 83). On the basis of this new information, the Bureau made further revisions to the audit, and produced a revised audit which was received into evidence on June 24, 2010 (T. 3487-3488, 3552-3554; Dept. Exs. 79, 80).

In preparing the new audit, the Bureau compared the information in daily logs (Dept. Exs. 81, 83) and additional certified payrolls (Dept. Ex 81) against its then existing audit (Dept.

[5] The Department obtained union benefit contribution reports from the Operating Engineers' (Dept. Ex. 39A), Laborers' (Dept. Ex. 39B) and Bricklayers' (Masons) unions (Dept. Ex. 39C). These reports showed weekly benefit contributions credited to particular Mercando employees (*Id.*). The benefit reports were compared to the certified payrolls and where a benefit was credited to an employee on a week that they appeared on the certified payrolls, the Bureau credited Mercando with the benefit payment (T. 1440-1441). If in comparing the contribution reports to the certified payrolls the Bureau couldn't tie a specific weekly benefit contribution to a specific week worked in the certified payroll, no credit was given (T. 1440-1442). Therefore, although additional benefit contributions may be shown for Mercando employees, Mercando received no credit because they Bureau could not establish whether the contribution was for Project 2 or some other job or for private work (T. 1442).

[6] Mr. Mercando maintains that the additional payroll records produced were records that had previously been provided to the Department and were not newly produced (T. 3513-3515). Inasmuch as the Bureau lost the previously filed employee complaints, it does not appear implausible that it may have also mishandled the payroll records. At one point in the hearing a certified payroll predating those in evidence was produced by Mr. Mercando from a pile of documents before him that he stated was a set of payrolls that the Department provided to him (T. 2011-2014).

Ex. 20) (T.3550-3551). The new audit slightly increased the underpayment determination from $52,279.12 to $53,912.36 (T. 3557; Dept. Ex 80). Generally, the higher underpayment determination resulted from the addition of six employees picked up in the certified payrolls (T. 3560),[7] the reduction of some time for employees who were already in the audit based on hours shown in the additional certified payrolls and daily logs (T. 3558), the removal of two employees (Maurice Hicks and Anthony Picardi) (*cf*, Dept. Ex. 21 and 80), and the addition of weeks shown in the additional certified payrolls (Dept. Ex. 81) that were not part of the certified payrolls originally relied on (Dept. Exs. 19A and 19B) (T. 3559).[8] The Bureau's methodology for the classification of workers and its credit for the rate of wages and supplements Mercando actually paid it employees was consistent with the methodology utilized in the prior iteration of the audit (T. 3559). With respect to hours, the Bureau determined that the daily logs and time sheets generally matched what was reported in the certified payrolls (T. 3564, 3566). As a result, the certified payrolls were generally relied on to establish hours worked (T. 3566). Where an employee worked at multiple sites on a single day, if the daily logs showed fewer hours worked then the certified payroll, the Bureau would credit the daily log, but this was an infrequent occurrence (T. 3564-3566).

After the revised audit was entered into evidence, extensive testimony was adduced concerning the methodology employed and extensive cross-examination of the Bureau Senior Investigator was conducted by both Mr. Mercando and Mr. Losco concerning the methodology and findings, which resulted in the Investigator agreeing to make post hearing adjustments to the audit (T. 6914-6915). Those proposed revisions were submitted with Department's Proposed Findings and the Respondents were afforded an opportunity to reply to the proposed

[7] For example, Nelson Melendez, who was the laborer foreman, and testified that he was a working foremen who worked for Mercando for 14 ½ years, and worked regularly on Project 2 for Mercando, not PEO Services, having no idea where that latter company's offices even were (T. 2623, 2626-2627, 2634, 2655-2656, 2674-2675, 2693-2694, 2965). He was added to the audit as result of his testimony as well as appearing in the additional certified payrolls (T. 3501-3502). Senior Investigator McCormick testified that the revised audit added five additional workers. Comparison of the Dept. Ex. 21 and Dept. Ex. 80 shows six new workers added and two workers deleted. Mr. Mercando claimed that one of the newly added workers, Steven Zonetti, actual worked for him as an automobile painter (T. 6733-6744). He was authorized to submit a post hearing affidavit from Mr. Zonetti confirming this (T. 6907). His July 27, 2012 transmittal letter accompanying his Proposed Findings purported to enclose statements from Messrs. Armento and Zenetti (Mr. Mercando's spelling), but none was enclosed. By email dated July 31, 3012 acknowledging receipt the Proposed Findings, he was specifically advised that those purported statements were not enclosed and asked if he intended to submit the same. His response to that email was silent as to whether the purported statements would be forthcoming and none was received. The laborer foremen testified that Mr. Zonetti occasionally worked on Project 2 (T. 2668).

[8] The original set of payrolls that the Department relied on, Department Exhibits 19A and 19B, ran from June 7, 2000 to May 1, 2001. The payrolls admitted as Department Exhibit 81 ran from March 15, 2000 to May 15, 2001.

modifications (T. 6914-6916). The proposed revisions resulted in a reduction of the underpayment determination from $53,912.36 to $50,970.07 as shown on a PW-27 Summary of Underpayments attached to the Department's Proposed Findings, which was accompanied by spreadsheet showing precisely what adjustments were being made to the audit (*Dept. Proposed Findings*). Neither the Mercando nor Losco Replies raised specific objections to the specific proposed adjustments (*Mercando Reply to Dept. Proposed Findings; Losco Reply to Dept. Proposed Findings*). The proposed adjustments are accepted, and the PW-27 submitted with the Department's Proposed Findings is considered the Bureau's final audit determination of the underpayments on Project 2. That final audit determines that for the period week-ending January 23, 2000 through week-ending May 22, 2001, Mercando underpaid $50,970.07 in wages and supplements to 20 workers.

Supplemental Benefit Credit

Throughout the hearing and in their Proposed Findings the Respondents objected to the Bureau's supplemental benefit credit methodology. Mr. Mercando maintains that Mercando paid all supplemental benefits to the respective unions on Project 2 and that the Bureau refused to credit contributions it provided proof of having made (T. 1747).

Mercando provided an affidavit from the attorneys representing the Trustees of the Bricklayers and Allied Craftworkers, Local 5 New York Retirement and Welfare Funds ("Local 5"), which avers that an action was commenced against Mercando by Local 5 seeking contributions in the amount of $7,570.71 for the period February 20, 2001 through October 9, 2001, that at the time the complaint was filed Local 5 showed no amounts delinquent prior to the time period stated in the complaint, and that thereafter Local 5 obtained a judgment for the amounts stated, and Mercando paid the Judgment and a Satisfaction of the Judgment was filed on or about April 2, 2003 (Resp. Mercando Ex. 15; *see, also*, T. 2335-2336). Mercando also produced an April 23, 2002 Contractor Delinquent Payment Report that showed delinquencies for particular employees on particular weeks on Project 2 that were included as part of Local 5's claim (Resp. Mercando Ex. 18).[9] The total delinquencies shown totaled $7,570.71 (Resp. Mercando Ex. 18), the same amount Local 5 sued to recover (Resp. Mercando Ex. 15). The contractor delinquency report specifically shows weekly delinquencies of $608.30 for George

9 Losco also submitted evidence of the Local 5 action (Respondent Losco Exs. 1, 2 [Demand letter and Summons and Complaint]).

Bennett and Melvin Boom ("Boone" in the Department audit) for weeks ending February 20, 2001, February 27, 2001, March 6, 2001, March 14, 2001 and March 21, 2001, all week endings in which Messrs. Bennett and Boom (Boone) appear on the Department's audit and for which Mercando receives no supplemental benefit credit (*cf.*, Mercando Ex. 18, Dept Ex. 20). It thus appears that those delinquencies were paid (*see, also*, T. 2343-2351, 2392-2393, 2424-2425). The Bureau, however, refused to credit those payments (T. 1513).

The Bureau's senior investigator testified that he contacted Local 5 concerning the affidavit and that the union advised him that the representation that all of "its" men were paid pertained only to local 5 members, not Local 1 (NYC members) or nonunion workers, and that it didn't collect for those other workers and was not seeking to collect for them (T. 1511-1513).[10] That statement is not consistent with the evidence, which clearly shows that the Bennett and Boom (Boone) delinquencies were part of the $7,570.71 sought in the Local 5 action and thus would have been part of the Judgment Mercando satisfied.

The week-ending delinquency totals for each of those men that was satisfied was $608.30, which, multiplied by the 5 weeks shown, totaled $3,041.50 for each of them. The PW-11 audit and Summary of Underpayment entered in evidence as Department Exhibits 79 and 80 showed a supplemental benefit underpayment of $3,600.10 for Mr. Bennett and $3,016.30 for Mr. Boom (Boone), which accounted for the entire underpayment determination for each of them as well.[11] Mercando should receive a credit of $3,041.50 against the $3,600.10 determined due for Mr. Bennett. As the amount actually paid for Mr. Boom (Boone) exceeds the amount required to have been paid, he should be removed from the final audit, which will result in a total reduction on his account of $3,016.30.[12]

Consequently, the $50,970.07 underpayment determined due in the final revised audit, as shown in the Summary of Underpayment attached to the Department's Proposed Findings,

[10] The Bureau accepted that the supplemental benefits for all Local 5 members had been paid (T. 1485). Although Mr. Mercando initially testified that Messrs. Bennett and Boom (Boone) were Local 5 members (T. 2368-2369, 2392-2393[2009]), he subsequently testified that they were members of Local 1(T. 5181 [2011]).

[11] This is the same underpayment determination found in the Department's final revised audit shown in its Summary of Underpayment attached to its Proposed Findings.

[12] It is the employer's responsibility to prove that it paid the supplemental benefit into a plan on behalf of the employee engaged on the public work project, not that the union benefit fund properly accounted for it, which is a matter exclusively covered by federal law. 12 NYCRR §§ 220.2 (a) (1), 220.2 (c) (1); *HMI Mechanical Systems, Inc. v. McGowen*, 266 F3d, 142, 150-151 (2d Cir. 2001).

should be further reduced by $6,057.80 to $44,912.27 on account of the aforesaid supplemental benefit credits.

Mercando also provided proof of a December 31, 2001 contribution of $21,887.46 to the Laborers' Local 235 Benefit Funds for Nelson Melendez, Robert Boyle and Luis A. Patino (Resp. Mercando Exs. 21, 17). The Department's senior investigator testified that the Bureau couldn't credit the amount reflected in the check because it was not able to correlate the contribution to any particular time those employees worked on Project 2, as opposed to private work and work on other projects (T. 1438, 1442-1443). Instead the Bureau relied on the Local 235 benefit report that showed what benefits were credited to particular employees for each week ending (T. 1439-1440; Dept Ex. 39B). Without the Respondent being able to particularize what work the $21,887.46 check was attributable to (T. 2221-2233), the Bureau's methodology was reasonable. Moreover, the sums paid by that check were presumably included in the Local 235 benefit report that the Bureau relied on.

Mr. Mercando further testified that all supplemental benefits were paid in full to the respective unions (T. 1747, 2333-2334), but Mercando provided no documentary proof to establish that the required supplemental benefits were fully paid for all workers on Project 2 (*see, e.g.,* T. 1750-1752). Mercando maintained that in general the Company's contributions were audited regularly by the unions, that reconciliations would be made, and that no outstanding balance or claims exist (T. 1758-1761, 2333-2336, 2395-2397, 2423-2425, and 2427-2428). The Respondent Losco also produced a check from Mercando to the Bricklayers' Pension Fund for $642.24 (Resp. Losco Ex. 29) and cover letters between Mercando Contracting and a Bricklayers' Benefit fund (apparently Local 1) or their attorneys purportedly evidencing the post-audit transmittal of checks in reconciliation of benefits in December 2000 ($3,675.04) and December 2001 ($3,947.06) (Resp. Losco Exs. 22, 24). Mercando's bookkeeper testified that Mercando was audited regularly and that all benefit contribution discrepancies were reconciled and satisfied (T. 5465- 5474, 5491- 5501, 5518-5521, 5938-5942, 5973-5974; *see, also,* Resp. Losco Exs. 8, 9, 17, 22, 24 [correspondence regarding benefit contributions reconciliation introduced through witness]). Through her testimony reconciliation checks with Local 235 were also received in evidence (Mercando Exs. 33, 34, 41 [Ex. 33 is the same $21,887.46 contribution discussed above]). She did not know whether the checks were attributable to benefits earned on Project 2 (T. 5551-5553).

Again, the Bureau refused to accept these generalizations, maintaining that it does not know what information the unions based their audits on, and would only credit payment for specific weeks when specific employees appeared in both the Project 2 payrolls and in the weekly union benefit reports that the Bureau obtain, and that the failure to pay supplemental benefits mainly involved non-union employees for whom no proof of payment of benefits was provided (T. 834, 1440-1442, 3645, 3649; Dept. Exs. 39A, 39B, 39C).

Messrs. Morgan, LaLama, Loggins, and Armento all testified that they were non-union employees and were not paid supplemental benefits (T. 351-352, 393-394 [Morgan], 415, 420 [LaLama], 2486 [Armento], 3254 [Loggins]). Mr. Mercando testified that non-union employees' benefits would not be paid to the respective unions – suggesting initially that benefit payments were the responsibility of an employee leasing company (T. 1841-1842). Messrs. Morgan and LaLama never appear on the certified payrolls prepared by the employee leasing company, however (T. 1832-1836, 2072-2078; Dept. Exs. 19A, 19B, 82). Paystubs provided by Mr. Loggins show no supplemental benefits being paid (T. 1838-1840; Dept. Ex. 3). Mr. Mercando testified that the certified payroll reports prepared by the employee leasing company were sent weekly with an invoice for the leased employee costs, which included charges for workers' compensation insurance, payroll taxes, human resource fees, and leasing fees (T. 1685, 1721-1722). Presumably the cost of any supplemental benefits provided by PEO would have been charged likewise. None of the invoices that Mr. Mercando testified accompanied the payrolls and billed Mercando for the leased employee costs were provided. In any event, Mr. Mercando later testified, in connection with the documents produced in response to the Department's subpoena *duces tecum*, that if any checks were made out for the payment of benefits, they would have been made by Mercando, not the employee leasing company (T. 2167-2169, 2178-2179, 2220).

Mercando Shareholders and Officers

Mr. Mercando testified that he is currently the sole officer Mercando, being its vice president (T. 1611, 1620, 1622). He testified that he had been president and is a shareholder, but not the sole shareholder, although he could not initially identify any other shareholders (T. 1620-1622). He also testified that he was president and a shareholder at the time Project 2 was performed, but couldn't recall who any of other shareholders were at that time or what the number of shares outstanding was (T. 1631-1634). On August 13, 2009 Mr. Mercando testified that he owned fifty percent of the stock, but that he didn't know who the remaining owners were

(T. 1995). Thereafter, in a September 1, 2009 response to the Department's subpoena *duces tecum* demanding, *inter alia*, the names of Mercando's shareholders and the percentage of shares owned by each, Mr. Mercando named Frank A. Mercando, Dominic Mercando, Frank Mercando, William Mazzella and J. Raymond Rodriguez, without providing percentages of ownership (Dept. Ex 69). His father, Dominic, ceased involvement in the business in 1996 (T. 1630). Mr. Mercando testified that he would give direction to superintendents and foremen on Project 2, but not individual employees, who were under the direct control of the superintendent or foremen (T.1673).

Mr. Mercando testified that at the time Project 2 was performed William Mazzella was a vice president of Mercando; that Mr. Mazzella oversaw the work, and directed and controlled the workers on Project 2; and that Mr. Mazzella ran the day to day operations of Mercando, assigned employees to particular job sites, tracked employees' time, provided that time to the employee leasing company, and gave on site direction to foremen and employees (T. 1655-1656, 1633, 1666-1673). He further testified that Mr. Mazzella was a shareholder at some point in time, but he didn't recall when (T. 1667-1668).

PEO Services

Mercando and Losco contend that PEO Services Inc. and/or PEO Services of Northeast Inc. (hereinafter collectively "PEO"), not Mercando, was the actual employer and subcontractor performing the work on Project 2 (T. 1730-1732; Mercando and Losco Proposed Findings). PEO was an employee leasing company (T. 1686). It was engaged in the business of leasing employees (*Id*.). According to the testimony of Mr. Mercando, PEO provided "leasing services to major corporations throughout the United States" (T. 1691). It went out of business in 2003 or 2004 (T. 1756).

During the course of the hearing, evidence was adduced showing that certain employees who are the subject of the alleged underpayment by Mercando were on the payrolls of or were employed by PEO (Dept. Exs. 69 [various W-2s for 2000 & 2001 and PEO employment packages for various employees], 74 [Melendez W-2], 19A [PEO created certified payrolls, which name Mercando as the contractor], 82 [additional PEO created certified payrolls, which name Mercando as the contractor]; Resp. Mercando Ex. 22 [Hicks PEO employment package]; Resp. Losco Ex. 19 [PEO blank employment package, *see*, T. 5930, 5933-5936], 21, 27, 31, 33, 34 [Exhibits 21-34 are representations by Mercando to third parties, including the State

Insurance Fund, that Mercando did not an employ the involved workers]). In response to a Department subpoena *duces tecum*, Mercando produced PEO "Employment Enrollment Packages" for, *inter alia*, David Armento, Roderick Perry, Andre Morgan, Jackson LaLama, Anthony Rodriguez, and Louis Patino, all of whom appear on the Department's audit (Dept. Ex. 69). Those employment packages refer to an included "Notification of Employee Leasing Agreement" that explained the concept of employee leasing to the workers, which was to be removed and retained by the enrollee (*see*, Resp. Losco Ex. 19 [copy of blank Employment Package containing Notification]). The Notification advised employees that as a result of an agreement between PEO and their employer, employment related responsibilities, services and liabilities would be shared between PEO and their current employer referred to as the "Client." (*Id*.). PEO would be responsible for payroll administration, including taxes and deductions, and the administration of benefits, unemployment, and workers' compensation (*Id*.). PEO would not have an on-site supervisor or representative at the worksite (*Id*.). "Instead, the Client or Client's manager will continue as the day-to-day supervisor of employees. … Client will establish its own worksite policies and procedures and will continue to make all operational, financial and business decisions regarding Client's services and products" (*Id*.). In the event the contract between PEO and the Client was terminated, the leased employees would no longer be shared (*Id*.). The Client would become their sole employer (*Id*.).

That subpoena response also included 2000 and 2001 W-2's for a number of the involve workers identifying PEO as their employer (*Id*.). The subpoena response also included PEO's Federal Tax Liability Reports for 2000 and 2001 showing gross wages and tax withholdings for a number of the involved workers (*Id*.).

The certified payroll reports from March 15, 2000 through November 30, 2000 are captioned "Certified Payroll Report PEO Services Inc.," but identify the contractor as "Mercando Contracting Company, Inc." (Dept. Exs. 80, 19A). Questioned about those payroll reports, Mr. Mercando explained that they were PEO payrolls and that Mercando was named as the contractor because the "payrolls were … for employees leased to Mercando Contracting" (T. 1684). Mr. Mercando testified that the PEO payroll reports were sent to Mercando as part of PEO's weekly billing statement – "it is a report of wages that PEO paid..." (T. 1719, 1684-1686, 1721-1722). Mercando kept track of employee time and reported it to PEO (T. 1773, 1893-1894). The workers rates of pay were established by union or prevailing rate schedules, which

were provided to PEO, or by rates claimed by workers in their employment application packages (T. 1709-1710, 1715, 1738, 1754-1755, 1879, 1886, 1898). PEO then produced the certified payroll reports and send them to Mercando with an invoice (T. 1774, 1894). Mercando then reviewed the payrolls sent by PEO to ensure that the reported hours were correct (T. 1775-1776). PEO would then send the payroll checks COD to Mercando overnight by Federal Express for distribution to the workers and Mercando would pay Federal Express the PEO's invoice, which invoice Federal Express would mark paid (T. 1774).

The payroll reports were then sent to Losco as the certified payrolls in connection with Mercando's monthly requisition for payment from Losco (T. 1724, 1741-1747). The payroll reports were also provided to the unions in connection the unions' audits of Mercando's benefit contributions (T. 1758-1760). The payroll certification affirms that "… this payroll is correct and complete, that the wage rates contained herein are not less than those determined by the secretary of labor and that the classifications set forth for each worker conforms with the *work being performed by Mercando Contracting Company, Inc.*" (T. 1797-1798; Dept. Ex. 19A) (emphasis added). The other set of payrolls (Dept. Ex 19B) only identify Mercando as the contractor, but Mr. Mercando denies that he or his company or PEO prepared these reports, as he claims they are not on forms utilized by either company (T. 1696-1703, 1724, 1782, 2439-2441). It does appear, however, from testimony concerning fax transmittal stamp records, that Mercando faxed at least a portion of these payroll records to Losco (T. 1964-1983).

Employee pay stubs were produced that named Mercando, not PEO, as the employer (Dept. Exs. 3 [Loggins], 68 [Armento], 71 &72 [Melendez]). The union benefit contributions were made by Mercando, which Mr. Mercado testified was necessitated by the fact that Mercando, not PEO, was the party to the union contacts (T. 1689-1690). Mr. Mercando also testified that any benefits paid to non-union workers would have been Mercando's responsibility (T. 2167-2169, 2178-2179).

Mercando Industries, LLC

Mercando Industries, LLC was formed in or about 2000 or 2001 (T. 1782). Mr. Mercando was a member of the limited liability company along with all of its employees (T.1783). It ceased doing business in or about 2005 due to a lack of work (T. 1784). The LLC shared a website with Mercando (Dept. Ex. 38). It was in the business of residential and small

commercial construction and remodeling (T. 1790). Mr. Mercando testified that he created the entity for a group of employees and beyond that his involvement was minimal (T. 1795-1796).

CONCLUSIONS OF LAW

JURISDICTION OF ARTICLE 8

New York Constitution, article 1, § 17 mandates the payment of prevailing wages and supplements to workers employed on public work. This constitutional mandate is implemented through Labor Law article 8. *Labor Law § 220, et seq*. "Labor Law § 220 was enacted to ensure that employees on public works projects are paid wages equivalent to the prevailing rate of similarly employed workers in the locality where the contract is to be performed and authorizes the [Commissioner of Labor] to ascertain said prevailing wage rate, as well as the prevailing 'supplements' paid in the locality." *Matter of Beltrone Constr. Co. v. McGowan*, 260 AD2d 870, 871-872 (3d Dept. 1999). Labor Law §§ 220 (7) and (8), and 220-b (2) (c), authorize an investigation and hearing to determine whether prevailing wages or supplements were paid to workers on a public work project.

The New York State Court of Appeals recently adopted a 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, 538 (2013). The Court stated the 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.*

Since the Yonkers Public School District is a party to the Project 2 contract, which involved the employment of workmen; and since the contract involved construction labor and was paid for by public funds; and since the construction of a public elementary school is for the use and benefit of the general public, Labor Law article 8 applies to Project 2. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530.

STATUTE OF LIMITATIONS

The Department is authorized to investigate the underpayment of workers on a public work project for a period of three years immediately preceding the filing of a complaint. *Matter of Pav-Lak Contracting Inc. v. McGowan*, 184 Misc. 2d 386, 389 (Sup. Ct., Nassau Co., 2000); *Labor Law § 220-b (2) (c)*. The evidence credibly establishes that employee complaints' alleging underpaid prevailing wages and supplements on Project 2 were first received by the Bureau on October 23, 2000. As the investigation concerned work performed on Project 2 in the years 2000 and 2001, the investigation concerned a period of time within the prescribed limitation.

PEO AS EXCLUSIVE EMPLOYER

PEO is an employee leasing company engaged in the business of providing employment leasing services. It is not a construction company; it is not engaged in the business of building structures, and it does not provide construction or construction-like services. It entered into a contract with Mercando to provide administrative employment leasing services, not construction services. PEO did not enter into a contract with either Losco or Mercando to build interior and exterior block walls or to provide any other related masonry work at Project 2. Mercando contracted with Losco to provide those construction services.

As an employee leasing company, pursuant to the notification PEO gave to Mercando's employees, it undertook to share employment related responsibilities, services and liabilities with Mercando. Specifically, PEO was responsible for payroll administration, including taxes and deductions, and the administration of benefits, unemployment, and workers' compensation. It did not have an on-site supervisor or representative at the worksite. Mercando continued as the day-to-day supervisor of the employees and was responsible for the establishment of its own worksite policies and procedures and continued to make all operational, financial and business decisions regarding its services and products. Upon termination of the contract between PEO and Mercando, the leased employees were no longer shared and Mercando became their sole employer.

The jurisdiction of Labor Law article 8 is limited to "contractors or subcontractors" who are engaged in the performance of "public work" construction projects. *Brukhman v. Giuliani*, 94 NY3d 387, 394 (2000). PEO is not a "contractor" or "subcontractor" within the meaning of Labor Law article 8; it is an administrative services vendor providing payroll and human

resource services to various businesses, including Mercando, and as such it would not have been a proper party to an enforcement action under article 8. *See, Brukhman v. Giuliani*, 94 NY3d 387, 395, *Tri-State Empl. Servs. v. Mountbatten Sur. Co.*, 99 NY2d 476, 480-487 (2003); *Labor Law § 220*. Mercando, a company engaged in the business of providing construction services on public work projects, is the "subcontractor" on Project 2, and as such was the party responsible for ensuring that the workers performing work on its contact were paid the prevailing rate of wages and supplements. *NY Const., art I, § 17; Labor Law § 220.*

Moreover, even assuming, *arguendo,* that PEO exercised sufficient direction and control over the work site employees to be considered to have actually provided labor to the project (as opposed to administrative services to Mercando) (*see, Tri-State Empl. Servs. v. Mountbatten Sur. Co.*, 99 NY2d 476, 484-487), given Mercando's contractual responsibilities, on-site supervision and control, and record keeping and reporting responsibilities, Mercando and PEO would nevertheless be joint employers, under which circumstance Mercando would be still be jointly and severally liable for the whole of the underpaid wages. *Zheng v. Liberty Apparel Co., Inc.*, 355 F3d 61, 66 (2d Cir. 2003); *Herman v. RSI Security Servs. Ltd.*, 172 F2d 132, 139 (2d Cir. 1999); *Chu Chung v. The New Silver Palace Rest., Inc*., 272 F. Supp 2d 314, 319, n.6 (US District Ct., SDNY, 2003) (The test under New York law for determining the existence of an employment relationship is the same as under the federal law).

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 (1st Dept. 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 (3d Dept. 2006), *lv denied*, 8 NY3d 803 (2007); *Matter of CNP Mechanical, Inc. v. Angello*, 31 AD3d 925, 927 (3d Dept. 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*, 180 AD2d 881, 881-882 (3d Dept. 1992), *lv denied*, 80 NY2d 752 (1992).

On each of the projects, the Bureau classified the work according to the nature of the work called for by the contracts and the employees' statements concerning the tasks they actually performed on the contracts. The Bureau investigator testified that he accepted the classifications established in Mercando's payroll records for employees that were recorded on the payrolls. For those not on the payrolls he relied on their complaint forms, statements and testimony concerning the tasks they performed. Based on the nature of the work required by the contract, and the tasks described, the hours were generally classified in the mason and laborer classification. There was also some work involving the operation of equipment which was classified as operating engineer's work. This process of classification is committed to the expertise of the Bureau and the Respondents have not demonstrated that the classifications utilized do not reflect the nature of the work actually performed.

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 (3d Dept. 1989) (citation omitted). "The remedial nature of the enforcement of the prevailing wage statutes … and its public purpose of protecting workmen … entitle the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate…." *Id*. at 820 (citations omitted). Methodologies employed that may be imperfect are permissible when necessitated by the absence of comprehensive payroll records or the presence of inadequate or inaccurate records. *Matter of TPK Constr. Co. v. Dillon*, 266 AD2d 82 (1st Dept. 1999); *Matter of Alphonse Hotel Corp. v. Sweeney*, 251 AD2d 169, 169-170 (1st Dept. 1998).

The Bureau relied on the Mercando's payroll records to establish the days and hours of work and the rates paid for those employees that appeared on the payrolls. Mercando's payroll records failed to record time worked for a number workers who actually worked on Project 2. Those inaccuracies required the Bureau to estimate the amount of time that those workers performed tasks in the various classifications. In doing so, the Bureau investigator looked to the time sheets Mercando provided as well as employee complaints, interviews and testimony to estimate the employees days and hours of work and rates paid. It relied on union benefit reports to establish supplemental benefits paid to any employees in any given week.

In light of Mercando's inaccurate payroll records, the Bureau was entitled to use information from investigatory interviews with employees and employee complaint forms, and employee testimony. *Matter of A. Uliano & Son. Ltd. v. New York State Department of Labor,* 97 AD3d 664, 667 (2d Dept. 2012). Moreover, hearsay evidence, if sufficiently believable, relevant and probative, constitutes substantial evidence. *Matter of Tsakonas v. Dowling*, 227 AD2d at 730. The Bureau's reliance on employee interviews and testimony, and the inferences drawn from therefrom, was necessitated by Mercando's failure to maintain accurate records of the time certain employees spent on Project 2. Although the determinations of amount of time worked may necessarily be imperfect approximations, the estimates have a rationale basis and are supported by substantial evidence.

The Bureau determined the rates that should have been paid for time employees worked in the various trade classifications by reference to the PRS in effect at the time. By multiplying the appropriate rates by the hours worked in the various classifications, the Bureau determined the wages and supplements that should have been paid on Project 2. It then compared the prevailing wages and supplements that should have been paid against what Mercando actually paid and thereby determined the underpayment on Project 2. The methodology is reasonable and supported by substantial evidence.

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, 928 (3d Dept. 2006), *lv denied*, 8 NY3d 802 (2007). Consequently, Jag 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. Where, however, the Department unreasonably delays the prosecution of a case, interest may be abated for that period of unreasonable delay.

The Delay Defense

Respondents contend that the Department has failed to expeditiously investigate and bring these cases to hearing, and on that basis, among others, urges that the case be dismissed (*see*, *Mercando & Losco Proposed Findings*). 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]), 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).

Although employee complaints' alleging underpaid prevailing wages and supplements on Project 2 were first received by the Bureau on October 23, 2000, causing the Bureau open the case on Project 2 on November 1, 2000, no investigation was commenced in earnest until October 19, 2004, when the Bureau sent a Payroll Records Request Notice to Mercando, Losco and the Yonkers Public School District (Dept. Ex 16).

In *Matter of M. Passucci*, the Appellate Division concluded, "that a three year delay in conducting a hearing is not expeditious and that the [contractor] should not be obligated to pay interest to that period of the Department's unreasonable delay [cite omitted]." *Matter of M. Passucci Gen. Constr. Co., Inc. v. Hudacs*, 221 AD2d at 988. In *Matter of CNP* the court applied that rule to a period of unreasonable delay between the filing of complaints and the commencement of the hearing. *Matter of CNP Mechanical, Inc. v. Angello*, 31 AD3d at 928-929. The period of delay from October 2000 through October 2004 appears to be attributable solely Bureau inaction. As a result of that delay, no interest should be computed in the final audit for

this four year period from October 2000 through October 2004. Any delay thereafter is not attributable solely to the Bureau, but was affected by Mercando's lack of cooperation in the investigative process, including its failure to timely and completely respond to demands for records.

With the exception of the exclusion of interest for the aforesaid four year period, Mercando is responsible for interest on the underpayment at the rate of sixteen (16%) per annum from the date of underpayment to the date of payment. *Matter of CNP Mechanical, Inc. v. Angello*, 31 AD3d 925, 928, *lv denied*, 8 NY3d 802; *Labor Law §§ 220 (8) and 220-b (2) (c).*

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) [13] provides, among other things, that when <u>two final determinations</u> of a "willful" failure to pay the prevailing rate

[13] "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.

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 (3d Dept. 1987). "Moreover, violations are considered willful if the contractor is experienced and 'should have known' that the conduct engaged in is illegal (citations omitted)." *Matter of Fast Trak Structures, Inc. v. Hartnett*, 181 AD2d 1013, 1013 (4th Dept. 1992); s*ee also, Matter of Otis Eastern Services, Inc. v. Hudacs*, 185 AD2d 483, 485 (3d Dept. 1992).

Mercando knew that Project 2 was a public work project requiring the payment of prevailing wages and supplements. Losco provided it with a PRS detailing the wages and supplements that were required to be paid. Mercando provided no evidence that the required supplemental benefits were paid to non-union employees. The failure to pay those benefits, in and of itself, constitutes a willful violation of Labor Law article 8.

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

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. *See, e.g., Matter of Miller Insulation Co., Inc.*, WAB Case No. 99-38 (1992). The dictionary definition of the word falsify generally involves the intent to misrepresent or deceive ("falsify." Merriam-Webster, 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; *Quotron Systems v. Gallman*, 39 NY2d 428, 431 (1976). The omission of underpaid non-union employees from the certified payrolls, including the complainants, demonstrates an intention to deceive and constitutes payroll falsification.

SUBSTANTIALLY OWNED-AFFILIATED ENTITIES

Labor Law § 220-b (3) (b) (1) provides that any successor or substantially owned-affiliated entity of the contractor shall likewise be ineligible to bid on, or be awarded public work contracts for the same time period as the contractor.

In pertinent part, Labor Law § 220 (5) (g) defines a substantially owned-affiliated entity as one were 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).

The record discloses that Mercando Industries, LLC, was formed in or about 2000 or 2001; that Mr. Mercando was a member of the limited liability company along with all of its employees; that it ceased doing business in or about 2005 due to a lack of work; that it shared a website with Mercando; and that it was in the business of residential and small commercial construction and remodeling. This limited record is insufficient draw any conclusions about a controlling ownership interest beyond the interconnected interest of Mr. Mercando, who testified that his involvement with this now apparently defunct entity was minimal. While making no recommendation on the state of this record concerning Mercando Industries, LLC's status as a substantially owned-affiliated entity, I note that Mr. Mercando stipulated to that status in the Stipulations of Settlement pertaining to Projects 1 and 3 (HO. Exs. 16, 17).

SHAREHOLDERS AND OFFICERS

Labor Law § 220-b (3) (b) (1) further provides that any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor, or, prior to November 1, 2002, any of the five largest shareholders of the contractor, or any officer of the contractor or 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.

Mr. Mercando was one of the top five shareholders of Mercando at the time Project 2 was performed and in that capacity is subject to the same bidding ineligibility as the corporate entity. Having determined that Mr. Mercando is one of the top five shareholders of Mercando, it is unnecessary to determine whether as an officer he knowingly participated in the willful violation.

The record lacks sufficient evidence to determine whether William Mazzella was one of the top five shareholders at the time Project 2 was performed, but it does establish that he was an officer who knowingly participated in Mercando's willful violations. He was vice president of Mercando and managed Project 2 on its behalf; he was responsible supervising project employees and for reviewing and reporting their time for the creation of weekly payroll; he reviewed and approved the payrolls that willfully underpaid employees and that were false. On that basis of that willful participation in the violations, he too is subject to the same bidding ineligibility as the corporate entity.

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 willful underpayment of approximately $45,000.00 to numerous employees on Project 2, which involved the falsification of payroll records, is a serious violation involving bad faith that justifies the maximum penalty sought by the Department, to-wit: 25% of the total amount due on Project 2.

LIABILITY UNDER LABOR LAW § 223

A prime contractor is responsible for its subcontractor's failure to comply with, or evasion of, the provisions of Labor Law article 8. *Labor Law § 223*; *Konski Engineers PC v. Commissioner of Labor*, 229 AD2d 950 (4th Dept. 1996), *lv denied* 89 NY2d 802 (1996). Such contractor's responsibility not only includes the underpayment and interest thereon, but also includes liability for any civil penalty assessed against the subcontractor, regardless of whether the contractor knew of the subcontractor's violation. *Canarsie Plumbing and Heating Corp. v. Goldin*, 151 AD2d 331 (1st Dept. 1989). Mercando performed work on the Project 2 as a subcontractor of Losco. Consequently, Losco, in its capacity as prime contractor, is responsible for the total amount found due from Mercando on Project 2.

RECOMMENDATIONS

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

DETERMINE that Mercando underpaid wages and supplements due the identified employees in the amount of $44,912.27 ($50,970.07 shown in the Summary of the most recent revised audit less $6,057.80 attributable to the recommended removal of Mr. Boone therefrom and the additional supplemental benefit credit on account of Mr. Bennett); and

DETERMINE that Mercando 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, excepting and excluding therefrom interest for the four year period from October 2000 through October 2004; and

DETERMINE that the failure of Mercando to pay the prevailing rate of wages and supplements was a "willful" violation of Labor Law article 8; and

DETERMINE that the willful violation of Mercando involved the falsification of payroll records under Labor Law article 8; and

DETERMINE that Frank J. Mercando is one of the five largest shareholders of Mercando;

DETERMINE that William Mazzella is an officer of Mercando who knowingly participated in the violation of Labor Law article 8; and

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

DETERMINE that Losco is responsible for the underpayment, and interest and civil penalty due pursuant to its liability under Labor Law article 8; and

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

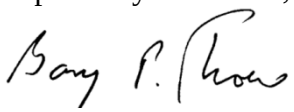
ORDER that Yonkers Public School District remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at 120 Bloomingdale Road, Room 204, White Plains, NY 10605

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

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

Dated: December 20, 2013
Albany, New York

Respectfully submitted,



Gary P. Troue, Hearing Officer