STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

ARRIS CONTRACTING COMPANY, INC.
Prime Contractor

and

MILLENNIUM PAINTING, INC.
Subcontractor

and

CHARLES OKRASKI
Individually as President and one who controls at least 10 percent of the outstanding stock of

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
20-05007610
03-007060 Orange County

IN THE MATTER OF

THE PIKE COMPANY, INC.
Prime Contractor

and

MILLENNIUM PAINTING, INC.
Subcontractor

and

CHARLES OKRASKI
Individually as President and one who controls at least 10 percent of the outstanding stock of

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
03-007060 Orange County

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

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on February 23, 2010, in Newburgh, New York. The purpose of the hearing was to provide all parties an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether Millennium Painting Inc. (“Millennium”) and its president, Charles Okraski, complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of two subcontracts on prevailing rate projects. The first project involved a painting subcontract with Arris Contracting Company, Inc. (“Arris”) on a project that involved the construction of police and court facilities in Wallkill, New York (“Project 1”) for the Town of Wallkill. The second project involved a painting subcontract for The Pike Company, Inc. (“Pike”) on a project that involved the reconstruction of interchange facilities (“Project 2”) for New York State Thruway Authority.

## APPEARANCES

The Bureau was represented by Department Counsel, Maria Colavito (Richard Cucolo, Senior Attorney, of Counsel). Although duly served with the Notice of Hearing (T. 7-9, 10-11; HO exs 1, 2), neither Millennium nor Charles Okraski filed an Answer to the charges contained in the Notice of Hearing or appeared at the hearing. They are therefore in default in this proceeding. Pike appeared at the hearing and settled the issue of its liability as a prime contractor under §223 of the Labor Law in a stipulation placed on the record at the hearing. Arris appeared with its attorneys, Corbally, Gartland and Rappleyea, LLP (Vincent L. DeBiase, Esq., of counsel) and contested the charges concerning Project 1 at the hearing. Proposed Findings of Fact and Conclusions of Law were received from the Department and the Arris on May 6, 2010. At that time, Arris also

submitted an affidavit addressed to the 12 NYCRR Part 221.1 conditions for civil penalty waiver against a prime contractor.

## FINDINGS OF FACT

The hearing concerned separate investigations made by the Bureau on two projects involving public work performed by Millennium. They will therefore be separately discussed.

### Project 1

### Town of Wallkill

On or about December 30, 2005, Arris entered into a general construction contract for Project 1 with the Town of Wallkill (Dept. Ex. 4). Thereafter, Arris entered into a painting subcontract with Millennium for the Project 1 (Dept. Ex. 5). On March 26, 2007, the Bureau received a complaint, on a labor organization verified complaint form, from Fernando Heredia, which alleged that prevailing wages were not being paid on Project 1 (Dept. Ex. 1). As a result of that complaint, the Bureau conducted an investigation (T. 15). Investigator Josephine Pagan conducted a telephone interview of Fernando Heredia in which Heredia stated that he made between $18.00 and $26.00 an hour for work as a painter (Dept Ex. 2; T. 17-18). The investigator found Heredia reluctant to provide information and he thereafter ceased cooperating (T. 17-18, 33).

The Bureau requested payroll records from Millennium but received no response (Dept. Ex. 8; T. 23). The Bureau obtained the certified payrolls Millennium provided to Arris from Arris (T. 21). The Bureau investigator described Arris as being “very cooperative” in the investigation (T. 30). Those payrolls were certified by Charles Okraski (Dept. Ex. 7). The Bureau determined that the payrolls were false in certifying that Millennium paid the required $35.88 hourly rate of wages to Mr. Heredia, since Mr. Heredia complained that he was not paid the prevailing rate and, when interviewed, stated he was being paid an hourly rate of $18.00, and at times $26.00. In view of Millennium’s refusal to provide any information, including canceled checks proving the rate it actually paid Mr. Heredia, the Bureau credited Mr. Heredia’s statement (Dept. Exs. 1, 9; T. 21-23, 34-35, 46-47).

In preparing its audit, the Bureau relied on the certified payrolls to establish the days and hours of work for two additional workers on the Project, and it accepted that each of those workers received the rate of pay reported in the payroll, since they refused to cooperate in the investigation (T. 28-29, 45). That methodology resulted in a small underpayment being determined for those two workers (Dept. Ex. 13). With regard to the complainant, Mr. Heredia, the Bureau credited him with having received $18.00 an hour for his work as a painter, since it received no information or cooperation from Millennium during its investigation (T. 28, 34). Moreover, Millennium was served with a copy of the Bureau's findings and the audit showing an $18.00 an hour credit for the complainant and it did not dispute the finding (T. 46). Employing the aforesaid methodology, the Bureau determined that Millennium underpaid $3,880.08 to three workers during the period week-ending January 27, 2006 through week-ending April 2, 2006 (T. 29; Dept Ex. 13).

**Project 2**

**Thruway Authority**

On or about January 24, 2006, Pike entered into a contract with the New York State Thruway Authority for reconstruction of the interchange seventeen facilities (Dept. Ex. 17). Thereafter, on or about August 21, 2006, Pike entered into a painting subcontract with Millennium to perform painting work on the interchange seventeen facilities (Dept. Ex. 18). On or about January 31, 2007, the Bureau received a complaint that Millennium was not paying prevailing wages on Project 2 (Dept. Ex. 14). As a result of that complaint, an investigation was initiated (T. 52).

During the course of its investigation, the Bureau obtained from Pike Millennium's certified payrolls, the engineer's daily reports, and Pike's daily construction reports (T. 56-57). The Bureau then compared the complaint, certified payrolls, engineer's reports, Pike's daily reports, and the applicable prevailing rate schedule and determined that Millennium had underpaid workers on Project 2 (T. 61). That conclusion was based on, among other things, the fact that the certified payrolls reported fewer workers than shown present on the engineer's daily reports (T. 62-63). The Bureau then prepared an audit that determined that Millennium underpaid four

workers for the week-ending September 8, 2006 through week-ending October 8, 2006, $1,710.64 (Dept. Ex. 29).

At the hearing, Pike stipulated to pay the $1,710.64 underpayment determined due, with interest at a rate of 10% totaling $584.28 (T. 70). The Department determined that Pike satisfied the requirements of 12 NYCRR Part 221 and stipulated to waive any civil penalty against Pike (*Id*.)

Millennium's president, Mr. Okraski, was previously the president of Poughkeepsie Painting and Decorating and Poughkeepsie Painting Contr. Inc. when those companies were found to have willfully violated Article 8 of the Labor Law (Dept. Exs. 30, 31; T. 60-61, 67-69).

## CONCLUSIONS OF LAW

### Jurisdiction of Article 8

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

Since the Town of Wallkill and the Thruway Authority are public entities, and are parties to the instant public work contracts, Article 8 of the Labor Law applies. Labor Law § 220 (2); *Matter of New York Charter School Association* v. *Smith*, _ NY 3d _ (2010); *Matter of Erie County Industrial Development Agency v Roberts*, 94 A.D.2d 532 (4th Dept. 1983), *affd* 63 N.Y.2d 810 (1984).

### Classification

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 App. Div. 236, 241 (1st Dept. 1954). Classification of workers is within the expertise of the Department. *Matter of Lantry v State of New York*, 6 N.Y.3d 49, 55 (2005); *Matter of Nash v New York State Dept of Labor*, 34 A.D.3 905, 906 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 803 (2007); *Matter of CNP Mechanical, Inc. v Angello*, 31 A.D.3d 925, 927 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 802 (2007). The Department's classification will not be disturbed "absent a clear showing that a classification does not reflect 'the nature of the work actually performed.' " *Matter of Nash v New York State Dept of Labor*, 34 A.D.3 905, 906, *quoting Matter of General Electric, Co. v New York State Department of Labor*, 154 A.D.2d 117, 120 (3d Dept. 1990), *affd* 76 N.Y.2d 946 (1990), *quoting Matter of Kelly v Beame*, 15 N.Y. 103, 109 (1965). Workers are to be classified according to the work they perform, not their qualifications and skills. *See, Matter of D. A. Elia Constr. Corp v State of New York*, 289 A.D.2d 665 (3d Dept. 1992), *lv denied*, 80 N.Y.2d 752 (1992).

There is no dispute in either project that painting work was performed and is the proper classification of the work.

**Underpayment Methodology**

"When an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer…." *Matter of Mid Hudson Pam Corp. v Hartnett*, 156 A.D.2d 818, 821 (3d Dept. 1989) (citation omitted). "The remedial nature of the enforcement of the prevailing wage statutes … and its public purpose of protecting workmen … entitle the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate…." *Id*. at 820 (citations omitted). Methodologies employed that may be imperfect are permissible when necessitated by the absence of comprehensive payroll records or the presence of

inadequate or inaccurate records. *Matter of TPK Constr. Co. v Dillon*, 266 A.D.2d 82 (1st Dept. 1999); *Matter of Alphonse Hotel Corp. v Sweeney*, 251 A.D.2d 169, 169-170 (1st Dept. 1998). Inasmuch as Millennium had provided false certified payrolls to the prime contractors on both Project 1 and Project 2, the Bureau was entitled to adopt a reasonable methodology to estimate the underpayment in each case. The methodology employed by the Bureau on both Projects was reasonable and should be sustained.

**Interest Rate**

Labor Law §§ 220 (8) and 220 b (2) (c) require that, after a hearing, interest be paid from the date of underpayment to the date of payment at the rate of 16% per annum as prescribed by section 14-a of the Banking Law. *Matter of CNP Mechanical, Inc. v Angello*, 31 A.D.3d 925, 927 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 802 (2007). Consequently, Millennium 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. Millennium should, however, receive credit against interest owed for interest amount paid by Pike on Project 2.

**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) [1] provides, among other things, that when two final determinations of a "willful" failure to pay the prevailing rate have been rendered against a contractor within any consecutive six-year period, such contractor shall be ineligible to submit a bid on or be awarded any public work contract for a period of five years from the second final determination.

For the purpose of Article 8 of the Labor Law, willfulness "does not imply a criminal intent to defraud, but rather requires that [the contractor] acted knowingly, intentionally or deliberately" – it requires something more than an accidental or inadvertent underpayment. *Matter of Cam-Ful Industries, Inc. v Roberts,* 128 A.D.2d 1006, 1006-1007 (3d Dept. 1987). "Moreover, violations are considered willful if the contractor is experienced and 'should have known' that the conduct engaged in is illegal (citations omitted)." *Matter of Fast Trak Structures, Inc. v Hartnett,* 181 A.D.2d 1013, 1013 (4th Dept. 1992). *See also, Matter of Otis Eastern Services, Inc. v Hudacs,* 185 A.D.2d 483, 485 (3d Dept. 1992).

[1] "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.

Millennium's president was familiar with the requirements of Labor Law Article 8 through his involvement in prior investigations. As such he knew or should have known of the obligation to pay prevailing wages and supplements to all workers for all hours worked. Millennium's failure to pay prevailing wages and supplements to all workers for all hours worked on each Project constitutes two separate and independent violations of Article 8.

**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. Millennium's false reporting of wages paid to Mr. Heredia on Project 1, and its underreporting of workers on Project 2, demonstrates payroll falsification on each Project.

**Partners, Shareholders or Officers**

Labor Law § 220-b (3) (b) (1) further provides that any officer of the subcontractor, who knowingly participated in the willful violation of Article 8 of the Labor Law, shall likewise be ineligible to bid on, or be awarded public work contracts for the same time period as the corporate entity. Mr. Okraski was at all relevant times the president of Millennium and in that capacity certified its payrolls. He therefore knowingly participated in the willful violations.

**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. In view of Millennium's utter lack of cooperation in the Department's investigations, the willful nature of the violations and

the falsification of its payroll records, the imposition of the maximum civil penalty of 25% on both Project 1 and Project 2 is justified.

**Liability under Labor Law § 223**

Under Article 8 of the Labor Law, a prime contractor is responsible for its subcontractor's failure to comply with or evasion of the provisions of the Article. Labor Law § 223; *Konski Engineers PC v Commissioner of Labor,* 229 A.D.2d 950 (1996), *lv denied* 89 N.Y.2d 802 (1996). The prime 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 A.D.2d 331 (1989). Millennium performed work on each of the Projects as a subcontractor. Consequently, Arris, in its capacity as the prime contractor, is responsible for the total amount found due from its subcontractor, including interest at the statutorily mandated rate, on Project 1. Arris has, however, submitted an affidavit addressed to the civil penalty waiver requirements of 12 NYCRR Part 221.1, and that affidavit avers satisfaction of the elements required for civil penalty waiver.[2] Consequently, Arris should

2 Section 221.1 provides, in pertinent part, as follows:

be found liable for the underpayments and interest only on Project 1. Pike stipulated to resolve its Article 8 liability on Project 2 as aforesaid.

## 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 Millennium underpaid wages and supplements due in the amount of $3,880.08 on Project 1;

DETERMINE that Millennium underpaid wages and supplements due in the amount of $1,710.64 on Project 2;

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(a) When, after an investigation or hearing, as provided in subdivisions 7 and 8 of section 220, and subdivision 2 of section 220-b of the Labor Law, it is determined that a subcontractor failed to pay prevailing wages and/or supplements, and the prime contractor, responsible for the noncompliance or evasion on the part of the subcontractor, makes restitution, the Commissioner of Labor, or his designated representative, may waive the civil penalty, to be assessed in accordance with subdivision 8 of section 220 and subdivision 2 of section 220-b of the Labor Law, where uncontroverted evidence of all of the following exists:

(1) the prime contractor, or its agent, provided the subcontractor with the applicable prevailing wage rate schedule for the project and any subsequently issued annual determinations or corrections;

(2) the prime contractor made a good faith effort to assure that the subcontractor complied with all Labor Law requirements, including, but not limited to, requesting and reviewing certified payroll records;

(3) the subcontractor cannot be located, despite the prime contractor having made a good faith attempt to locate said subcontractor, or the subcontractor has filed for bankruptcy protection, or the subcontractor is no longer in business;

(4) the prime contractor has paid the subcontractor in full in accordance with the terms of its subcontract agreement;

(5) the prime contractor has fully cooperated, in a timely manner, with the Department of Labor's investigation; and

(6) in all likelihood, the prime contractor will be unable to receive indemnification from the subcontractor for the restitution it has paid.

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

DETERMINE that the failure of Millennium to pay the prevailing wage or supplement rate on each Project was a "willful" violation of Article 8 of the Labor Law and thus constitutes two separate and independent "willful" violations of Article 8;

DETERMINE that the willful violations of Millennium on both Project 1 and Project 2 involved the falsification of payroll records under Article 8 of the Labor Law;

DETERMINE that Charles Okraski is an officer of Millennium;

DETERMINE that Charles Okraski knowingly participated in the violation of Article 8 of the Labor Law;

DETERMINE that Millennium be assessed a civil penalty in the amount of 25% of the underpayment and interest due on both Project 1 and Project 2;

DETERMINE that Arris is responsible for the underpayment and interest due on Project 1 pursuant to its liability under Article 8 of the Labor Law;

DETERMINE that, upon Pike's complete performance of the Stipulation, it has fully satisfied its liability in this case under Article 8 of the Labor Law; and

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

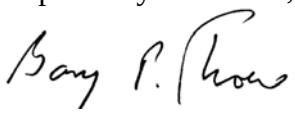
ORDER that Millennium shall receive a credit for the amounts paid by Pike on Project 2;

ORDER that upon the Bureau's notification, Millennium shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at The Maple Building, 3 Washington Center, 4th Floor, Newburgh, NY 12550; 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: October 26, 2010
Albany, New York

Respectfully submitted,



Gary P. Troue, Hearing Officer