

IN THE MATTER OF

MURPHY'S DISPOSAL SERVICES, INC.  
Prime Contractor

and

MICHAEL J. EVERETH  
Individually, as President and as one who owns or controls  
10 percent of the stock of  
MURPHY'S DISPOSAL SERVICES, INC.

**REPORT  
&  
RECOMMENDATION**

Prevailing Rate Case  
06-00480 Albany County

A proceeding pursuant to Article 9 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.

To: Honorable M. Patricia Smith  
Commissioner of Labor  
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on October 28, 2009, in Albany, 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 Murphy's Disposal Services, Inc. ("Prime"), and Michael J. Evereth, individually as president and/or as one who owns or controls ten per cent of the stock of the Prime<sup>1</sup>, complied with the requirements of Article 9 of the Labor Law (§§ 230 *et seq.*) in the

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<sup>1</sup> Unlike the language found in Labor Law §§ 220 and 220-b, Labor Law §235 (7) states, in part, "When, pursuant to the provisions of this section, two final orders have been entered 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 of the five largest shareholders of the contractor or subcontractor ..." (emphasis added). Accordingly, this Report and Recommendation will address the issue as defined in statute.

performance of a contract involving building services (“Project”) for the Town of Colonie, Albany County (“Department of Jurisdiction”).

### **APPEARANCES**

The Bureau was represented by Department Counsel, Maria Colavito, Richard Cucolo, Senior Attorney, of Counsel.

Michael J. Evereth appeared for the hearing and was represented by John J. Poklemba.

### **ISSUES**

1. Did the contractor pay the rate of wages or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?
2. If there was an underpayment, what rate of interest should be applied?
3. Was any failure to pay the prevailing rate of wages or to provide the supplements prevailing in the locality “willful”?
4. Is Michael J. Evereth one of the five largest shareholders of the Prime?
5. Is Michael J. Evereth an officer of Prime who knowingly participated in a willful violation of Article 9 of the Labor Law?
6. Should a civil penalty be assessed and, if so, in what amount?

### **FINDINGS OF FACT**

The hearing concerned an investigation made by the Bureau on the Project, which involved a contract between Prime and the Department Of Jurisdiction for leaf and yard waste collection (PRC No. 06-00480) (“Contract”), entered into on or about October 5, 2004 (DOL Ex. 4).

The Contract established a thirty-six week period during which collection and disposal took place, running from March 28, 2005, through December 2, 2005, with additional work available through and extension in 2006 (DOL Ex. 4, Tr. p. 75).

The Department of Jurisdiction did not include a Prevailing Wage Rate Schedule (“Schedule”) with the bid documents that became a part of the Contract, (DOL Ex. 4; Tr. pp. 47).

Prior versions of the Contract entered into by the Prime included a letter dated February 22, 1996, from the Director of the Bureau, stating that leaf and yard waste collection was not within the jurisdiction of Article 9 of the Labor Law (Resp. Ex. B, Tr. pp. 56, 57).

The Prime worked for the Department of Jurisdiction from 1997 through 2006 under essentially the same terms and conditions as found in the Contract (Tr. pp. 57 - 59).

On or about March 14, 2005, the Bureau issued Schedule #00590135, covering trash and refuse removal and establishing the prevailing rate of wages and supplements for drivers and helpers in Albany County for the year 2005 as follows: driver wages \$13.72 per hour, driver supplements \$2.63 per hour (single) and \$5.73 per hour (family); helper wages \$12.75 per hour, helper supplements \$2.63 per hour (single) and \$5.73 per hour (family). For the year 2006, the rates were as follows: driver wages \$14.32 per hour, driver supplements \$2.81 per hour (single) and \$6.28 per hour (family); helper wages \$13.35 per hour, helper supplements \$2.81 per hour (single) and \$6.28 per hour (family) (DOL Ex. 5).

On or about July 12, 2006, the Bureau received a complaint concerning the Project (DOL Ex. 1).

The Bureau requested payroll records from the Prime on October 17, 2006 (DOL Ex. 3).

The Prime provided the Bureau with payroll records concerning workers it employed on the Project (DOL Ex. 7, 12).

During the course of the original investigation, the Bureau investigator notified the Prime of its obligation to pay prevailing wages some time in August, 2006 (Tr. p. 32).

The Prime asked the Department of Jurisdiction to open the Contract to provide for additional money so that the Prime could pay the prevailing wages it was required to pay and was refused (Tr. pp. 63, 66).

The Prime continued to pay less than the prevailing rate of wages and supplements for the remainder of the Contract in 2006 and for two weeks in April, 2007 (Tr. p. 32, 77; Dept. Ex. 12).

Based upon the Contract, the Schedule, the payrolls supplied by the Prime, and the nature of the work performed, the Bureau investigator established that the workers on the Project included drivers and helpers (DOL Ex. 4, 5, 12, 13; Tr. pp. 28, 29).

The Bureau investigator compared the payroll records supplied to the Department by Prime and the Schedule and, using the hours worked and the amounts paid as shown on the payroll records, prepared an audit which shows, for the period week ending March 31, 2005 through week ending December 7, 2006, underpayment of wages and supplements to fourteen workers on the Project as follows: wages underpaid - \$14,517.84; supplements underpaid - \$54,889.93, for a total underpayment amount of \$69,407.77 (DOL Ex. 13; Tr. pp. 28, 29).

The Bureau had no record of prior investigations of, or issues concerning, the Prime (Tr. p. 31).

Murphy's Disposal Service, Inc., is a corporation established under the laws of New York State (Dept. Ex. 8).

Michael J. Evereth was president and one of the five largest shareholders of Murphy's Disposal Service Inc. (Tr. pp. 80, 81).

## **CONCLUSIONS OF LAW**

### **Jurisdiction of Article 9**

Section 17 of Article 1 of the New York State Constitution mandates the payment of prevailing wages and supplements to workers employed on public works. This constitutional mandate is implemented, in part, through Labor Law Article 9. Section 235 of Article 9 of the Labor Law authorizes an investigation and hearing to determine whether prevailing wages were paid to building service employees under a contract for building service work with a public agency.

As the Town of Colonie is a party to a contract with the Prime requiring the employment of drivers and driver helpers to collect and dispose of yard waste, Article 9 of the Labor Law applies.

### **Classification of Work and Underpayment**

Labor Law § 231 (1) requires that “Every contractor shall pay a service employee under a contract for building service work a wage not less than the prevailing wage in the locality for the craft, trade or occupation of the service employee.” Under Labor Law §230, a contractor is defined as any employer who employs employees to perform building service work under a contract with a public agency; a building service employee is defined as a person performing work in connection with the care or maintenance of an existing building, or in connection with the transportation of office furniture or equipment to or from such building, or in connection with the transportation and delivery of fossil fuel to such building for a contractor under a contract with a public agency which is in excess of one thousand five hundred dollars and the principal purpose of which is to furnish services through the use of building service employees. Under §230 (1), a building service employee includes occupations relating to the collection of garbage or refuse. A public agency is defined as the state, any of its political subdivisions, a public benefit corporation, a public authority or commission or special purpose district board appointed pursuant to law, and a board of education; wage is defined as a basic hourly cash rate of pay and supplements; and prevailing wage is defined as the wage determined by the fiscal officer to be prevailing for the various classes of building service employees in the locality.

Labor Law §233 requires that, “in all cases where service work is being performed pursuant to a contract therefor, the contractor shall keep original payrolls or transcripts thereof, subscribed and confirmed by him as true, under penalties of perjury, showing the hours and days worked by each employee, the craft, trade or occupation at which he was employed, and the wages paid.” However, “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 Prime provided the Bureau investigator with payroll records which the investigator used in conjunction with the Contract to establish the classifications used in the Department audit.

The investigator examined the hours worked and amounts paid to workers as shown on the Prime’s payrolls and compared the wages and supplements with those required by the applicable Schedule. This resulted in the audit which found there to have been, for the week ending March 31, 2005 through the week ending December 7, 2006, underpayments of wages and supplements to fourteen workers in the total amount of \$69,407.77. There was no need to reconstruct wage information, as the hours and wages paid were taken directly from the Prime’s payroll information and compared with the appropriate Schedule.

### **Willfulness of Violation**

Pursuant to Labor Law § 235 (7), the Commissioner of Labor must make a final determination as to the willfulness of any violation because the law provides, among other things, that when “two final orders have been entered against a contractor ... within any consecutive six-year period determining that such contractor ... has willfully failed to pay the prevailing wages in accordance with the provisions of this article, ... [that contractor] shall be ineligible to submit a bid on or be awarded any public building service work for a period of five years from the date of the second order.”

For the purpose of Article 9 of the Labor Law, the term 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. *See, 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).” *See, Matter of Fast Trak Structures, Inc. v Hartnett*, 181 AD2d 1013, 1013 (4th Dept 1992). *See also, Matter of Otis Eastern Services, Inc. v Hudacs*, 185 AD2d 483, 485 (3d Dept 1992).

In this case, the Prime was notified of the requirement to pay prevailing wages and supplements in August, 2006, yet failed to pay those wages for the remainder of 2006 and for two weeks in 2007. There is no question that Prime knew of its obligation as of August 2006, regardless of what it may have believed prior to that date. Accordingly, the violation is willful.

### **Partners, Shareholders or Officers**

Labor Law §235 (7) further provides any contractor, subcontractor, successor, or any substantially owned-affiliated entity of the contractor or subcontractor, or any of the partners or any of the contractor’s five largest shareholders, or any officer of the contractor or subcontractor who knowingly participated in the willful violation of Article 9 of the Labor Law shall, in the event of debarment, likewise be ineligible to bid on, or be awarded any public building service work for the same time period as the corporate entity.

Mr. Evereth, who knowingly engaged in the activity involving the underpayment of prevailing wages and supplements, was the president and one of the five largest shareholders of the Prime and as such is subject to the constraints of Labor Law §235 (7).

### **Interest Rate and Civil Penalty**

Labor Law § 235 (5) (c) provides for an award of interest of not less than 6% per annum and not more than the rate of 16% per annum, as prescribed by section 14-a of the Banking Law, from the date of underpayment to the date of payment. Labor Law §235 (5) (b) provides for the imposition of a civil penalty in an amount not to exceed 25% of the total amount due. In determining either the rate of interest to be imposed or in assessing the amount of the civil penalty, consideration must 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 of the employer, ... and the failure to comply with record keeping and other non-wage requirements.” Labor Law § 235 (5) (b & c).

The Prime has no history of prior violations. The Prime responded promptly to requests for payrolls, and was not the subject of record keeping violations. Furthermore, the Prime, at least at one point, had a clear determination from the Director of the Bureau that the work in which it was engaged was not covered by Labor Law Article 9. Given these circumstances, I find that the interest imposed should be at a rate of 6%, and that there should be no civil penalty imposed.

### **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 Prime underpaid wages and supplements due the identified employees in the amount of \$69,407.77;

DETERMINE that the failure of Prime to pay the prevailing wage or supplement rate was a willful violation of Article 9 of the Labor Law;

DETERMINE that Michael J. Evereth is an officer of the Prime who knowingly engaged in the underpayments;

DETERMINE that Michael J. Evereth is one of Prime’s five largest shareholders;



DETERMINE that Prime is responsible for interest on the total underpayment at the rate of 6% per annum from the date of underpayment to the date of payment;

DETERMINE that Prime not be assessed a civil penalty;

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

ORDER that upon the Bureau's notification, Prime shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau of Public Work, SOB Campus Bldg 12 Room 130, Albany, NY 12240; and

Dated: December 30, 2010  
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Tracy", with a long horizontal flourish extending to the right.

Jerome Tracy, Hearing Officer