STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

JAMES L. NUGENT,
Individually and as an Officer of ROOFCARE, INC.

and

KEVIN ELMES
Individually and as an Officer of ROOFCARE, INC.

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
99-05286 Westchester County

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 August 11, 2009, in White Plains, 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 James L. Nugent, individually and as an officer of Roofcare, Inc., and Kevin Elmes, individually and as an officer of Roofcare, Inc., ("Respondents"), complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of a contract involving the renovation and repair of the Coyne Park Senior Center roofs ("Project") for the City of Yonkers ("Department of Jurisdiction").

APPEARANCES

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

Kevin Elmes appeared on his own behalf. James Nugent submitted a response to the Notice of Hearing, received on July 17, 2009 (HO Ex. 3). Mr. Nugent did not appear for the hearing.

Roofcare, Inc., was neither named nor served, and did not appear.

ISSUES

1. Given the facts in evidence, can the Commissioner find an underpayment of the wages or supplements prevailing in the locality to workers on the Project, and, if so, the amount of underpayment?
2. What rate of interest should be assessed on any underpayment, and for what period of time?
3. Was any failure to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
4. Was James Nugent one of the five largest shareholders of Roofcare, Inc.?
5. Was Kevin Elmes one of the five largest shareholders of Roofcare, Inc.?
6. Was James Nugent an officer of Roofcare, Inc., who knowingly participated in a willful violation of Article 8 of the Labor Law?
7. Was Kevin Elmes an officer of Roofcare, Inc., who knowingly participated in a willful violation of Article 8 of the Labor Law?
8. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

The Project involved a contract between Roofcare, Inc., and the City of Yonkers in Westchester County involving the renovation and repair of the Coyne Park Senior Center roofs (PRC No. 99-5286) (DOL Ex. 3).

Pursuant to the Notice of Hearing, Roofcare, Inc., is not a named Respondent (HO Ex. 1). There are no facts in evidence concerning the reason why Roofcare, Inc., is not a named Respondent.

James Nugent, signing as the president of Roofcare, Inc., submitted the bid for the Project on May 4, 1999 (DOL Ex. 3).

James Nugent was the sole officer, director, policymaker and shareholder of the issued stock of Roofcare, Inc.; he was also responsible for all financial decisions for Roofcare, Inc. (DOL Ex. 3).

James Nugent sold whatever interest he had in Roofcare some time in August, 1999 (HO Ex. 3).

The contract for the Project was entered into on or about June 22, 1999 (DOL Ex. 3).

The Bureau issued a Prevailing Wage Rate Schedule for the Project on July 1, 1998 (DOL Ex. 4). This schedule established, for the period July 1, 1998 through June 30, 1999, the following wage and supplement information: for roofer, wages of $26.58 per hour and supplements of $15.30 per hour (DOL Ex. 4).

The Bureau issued a second Prevailing Wage Rate Schedule for the Project on July 1, 1999 (DOL Ex. 5). This schedule established, for the period July 1, 1999 through June 30, 2000, the following wage and supplement information: for roofer, wages of $26.58 per hour and supplements of $15.30 per hour.

The Department investigator's notes show that the Project was completed in August of 2000 (DOL Ex. 6).

On August 31, 2000, the Bureau received a Claim for Wage and/or Supplement Underpayment from Miguel Avila, claiming an underpayment of wages for the week ending June 13, 2000 (DOL Ex. 1).

Javier Murillo submitted a claim for wages but did not specify dates or hours worked or amounts owed to him (DOL Ex. 1).

The Bureau investigator received the file and began an investigation on February 9, 2005 (Tr. p. 31).

The Bureau investigator said that the lapse of almost five years between the filing of a claim form and the investigation itself was the result of insufficient manpower in the Bureau (Tr. p. 46).

Further inquiry by the Bureau investigator elicited additional information from claimants (DOL Ex. 1; Tr. p. 33)

On February 9 and February 17, 2005, the Bureau investigator requested payroll records from Roofcare, Inc. (DOL Ex. 6).

Neither Roofcare, Inc., nor the City of Yonkers provided the Bureau with any payroll records or supporting documents (Tr. p. 41).

The Bureau investigator prepared an audit finding underpayments to workers on the Project from the week ending June 12, 1999 through October 2, 1999, a period of 16 weeks, as follows: Miguel Avila, wages due of $281.28, supplements due of $244.80; Leonides Martinez, wages due of $7,231.68 and supplements due of $7,588.80; Javier Murillo, wages due of $3,455.68 and supplements due of $7,588.80 (DOL Ex. 12).

Claimant Javier Murillo stated that it took from three to four weeks to complete the job and that he did not work weekends (Tr. p. 11, 15-16). Claimant Leonides Martinez did not recall what he was paid on the Project (Tr. p. 26).

Neither Murillo nor Leonides stated the dates they worked on the Project.

Kevin Elmes was an employee of Roofcare, Inc., and designated "secretary," but may not have been so designated at the time work was performed on the Project (Tr. p. 52). Elmes was not a shareholder of Roofcare, Inc. (Tr. p. 58). Elmes estimated that it took "probably three" weeks to complete the Project (Tr. p. 54).

Based upon the testimony of the witnesses, the Department requested an opportunity to revise the audit that had been prepared (Tr. pp. 60, 61). An amended audit was received by the Hearing Officer on August 21, 2009, and accepted into evidence as DOL Exhibit 12A (DOL Ex. 12A). The Respondents did not object to the introduction of DOL Exhibit 12A. The revised audit found underpayments to workers on the Project for

the period week ending June 12, 1999 through week ending July 10, 1999 as follows: for Miguel Avila, wages due of $343.02 and supplements due of $275.40; for Leonides Martinez, wages due of $2,028.30 and supplements due of $153.00; and for Javier Murillo, wages due of $1,248.30 and supplements due of $1,009.80 (DOL Ex. 12A). The Department did not provide an explanation for the use of the week ending dates used in Exhibit 12A.

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 City of Yonkers, a public entity, is a party to the instant public work contract, Article 8 of the Labor Law applies. Labor Law § 220 (2); and *see, Matter of Erie County Industrial Development Agency v Roberts,* 94 A.D.2d 532 (4th Dept. 1983), *affd* 63 N.Y.2d 810 (1984).

Underpayments of prevailing wages and supplements may have occurred on the Project. However, the party that would have been responsible for those underpayments, Roofcare, Inc., is not a Respondent in this proceeding. There is no credible evidence in the record that Kevin Elmes was an owner or officer of Roofcare at the time of the Project. Furthermore, James Nugent states in his letter, Hearing Officer Exhibit 3, that

Roofcare was sold in August, 1999, and subsequent to the sale he was not an owner or officer of the company.

The testimony of the workers, while credible, is vague with regard to the hours, days or even the general period of time they worked. The Project was scheduled to begin some time in mid-to-late 1999, but testimony from the workers, Elmes and the Department investigator fails to establish any specific period from June, 1999 through October, 1999. The initial claim that began the investigation alleged underpayments for a week in June, 2000. The Department investigator's own notes state that the Project ended in October 2000. While that date seems suspect given the nature of the Project, it remains in the record as part of the Department investigator's Case Contact Sheet. Either it is correct, which throws further doubt on to the dates used in the Department's audit, or it is inaccurate, which creates cause for concern with regard to the information obtained by the Department investigator and the uses to which such information was put.

Regardless, after reviewing the record I find there is no basis for the Department's use of the period week ending June 12, 1999 through week ending July 10, 1999 in its audit, especially when in the first audit Department Exhibit 12, which the Department discarded after hearing the testimony of the workers at the hearing, it used the period week ending June 12, 1999 through week ending October 2, 1999. Whatever underpayments may have occurred could as easily have happened after the time when James Nugent was no longer an owner or officer of Roofcare. Such ambiguity with regard to so basic an issue makes a finding of underpayments against Nugent unreasonable. Therefore, in light of the above, no finding of underpayments against Roofcare, Inc., Elmes, or Nugent can be made.

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). The violator's knowledge may be actual or, where he should have known of the violation, implied. *Matter of Roze Assocs. v Department of Labor,* 143 A.D.2d 510; *Matter of Cam-Ful Industries, supra.* An inadvertent violation may be insufficient to support a finding of willfulness; the mere presence of an

[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 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.

underpayment does not establish willfulness even in the case of a contractor who has performed 50 or so public works projects and is admittedly familiar with the prevailing wage law requirement. *Matter of Scharf Plumbing & Heating, Inc. v Hartnett,* 175 A.D.2d 421.

Given that a finding of underpayments by the Respondents cannot be made in the first place, a finding of willfulness becomes legally impossible. Even arguing for a moment that such a finding could be made, the facts of this case, such as they are, are largely limited to the ten year old recollections of two workers on the Project and one of the Respondents. While the standard for finding willfulness is broad, it nevertheless requires some basis in fact, and the mere underpayment of wages or supplements does not, by itself, establish willfulness. Accordingly, even if a determination as to willfulness were possible, the Department has not shown the underlying facts necessary for such a finding.

Partners, Shareholders or Officers

Labor Law § 220-b (3) (b) (1) further provides that any contractor, subcontractor, successor, or any substantially owned-affiliated entity of the contractor or subcontractor, or any of the partners or any of the five largest shareholders of the contractor or subcontractor, or any officer of the contractor or 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. As there is no finding of willfulness possible in this matter, no shareholder or officer of the contractor may be found liable for willfully violating Article 8.

Civil Penalty

It would likewise be inappropriate to impose a civil penalty when no underlying liability for any underpayments can be found.

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 no finding of underpayments can be made;

DETERMINE that no finding of liability concerning underpayments or willfulness can be made with regard to James L. Nugent and Kevin Elmes;

DETERMINE that no finding of willfulness can be made based upon the facts in evidence;

ORDER any withheld funds be released to the contractor from which they were withheld; and

ORDER the Notice of Hearing in this matter be dismissed.

Dated: January 14, 2010
Albany, New York

Respectfully submitted,

Jerome Tracy, Hearing Officer