

STATE OF NEW YORK: DEPARTMENT OF LABOR

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In the Matter of

Shane O'Donnell DBA O'Donnell Construction, and Shane O'Donnell as an owner and officer of Shane O'Donnell DBA O'Donnell Construction;

**DEFAULT REPORT &
RECOMMENDATION**

Prime Contractor,

for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for the laborers, workers and mechanics employed on a public work project for the County of Cortland, in Cortland, New York.

Prevailing Wage Rate
PRC No.: 22019005228
Case ID: PW00 2019004216
Cortland County

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

Pursuant to a Notice of Hearing issued by the Commissioner of Labor on November 7, 2023, a videoconference hearing was held on February 8, 2024, in Albany, New York with participating parties and/or witnesses appearing remotely at various other locations. 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 Shane O'Donnell, doing business as ("DBA"), O'Donnell Construction, and Shane O'Donnell as an owner and officer of O'Donnell Construction; (hereafter all known as: "Respondents" or "O'Donnell Construction"), complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) to pay or provide the prevailing rates of wages and supplements to laborers, workers or mechanics employed in the performance of the public work project they were involved in. The

captioned matter involved a public work contract between Respondents and the County of Cortland, (hereinafter “Cortland County”) for a roofing and paint/lead abatement project of the Dwyer Memorial Park Pavilion, located at 6799 Little York Lake Road, Preble, New York 13803 (“the Project”).

HEARING OFFICER

Marshall H. Day was designated as Hearing Officer and conducted the hearing in this matter.

APPEARANCES

The Bureau was represented by Department General Counsel, Jill Archambault, Rian Vernon, Senior Attorney, of Counsel.

There was no appearance made by, and on behalf of the Respondents.

FINDINGS AND CONCLUSIONS

On November 13, 2023, the Department duly served a copy of the Notice of Hearing on Respondents, via regular and certified mail, return receipt requested (Hearing Officer Exs. 1 and 2). The Notice of Hearing scheduled a hearing on February 8, 2023, and required the Respondents to serve an Answer at least fourteen days in advance of the scheduled hearing.

Respondents failed to file an Answer to the charges contained in the Notice of Hearing or to appear at the hearing. Consequently, Respondents are in default in this proceeding.

The Notice of Hearing alleges that Respondents willfully failed to pay prevailing wages and supplemental benefits to its laborers, workers and mechanics employed in the performance of a public work contract with the Cortland County during the said claim period.

At the hearing, the Department produced substantial and credible evidence, including the sworn testimony of the Bureau investigator and documents describing the wage and supplemental underpayments, which supported the Bureau’s charges that:

The Project was subject to Labor Law Article 8; and

Respondents entered into a public work contract with Cortland County to provide the labor, material and/or services necessary to complete the Project under the terms of that agreement; and

Respondents failed to pay or provide the proper prevailing wages and supplemental benefits to its laborers, workers and mechanics on the Project; and

Respondents willfully underpaid \$56,382.08 in wages and supplemental benefits to its workers for the audit period from week ending May 7, 2019 through week ending July 23, 2019; and

GENERAL FINDINGS

Shane Clifford O'Donnell is an owner and officer of O'Donnell Construction; and

Shane Clifford O'Donnell knowingly participated in the violation of Labor Law Article 8 on the Project; and

The Bureau used the interviews with workers, the employee interview sheets, the contract and the bid package to determine the classification of work, the days and hours worked and wage rates paid to each employee¹, and the Bureau compared the wages indicated received by the employees with the wages/supplemental rates contained in the prevailing wage schedule applicable in the county at issue for the rates that should have been paid, to ultimately determine the amount of unpaid prevailing wages and supplements due to the workers on the Project; and

The Respondents initially were responsive, however as the investigation progressed failed to either respond to the investigator's inquires or offer any evidence that it paid the correct wages and supplemental benefits that were owed to its workers on Project², instead the Bureau had to secure the records necessary to complete their investigation from Cortland County and

¹ The initial investigation was commenced by the Bureau of Public Work in May of 2019 after a routine site visit of the Project was conducted, and some pay irregularities were discovered. The investigator interviewed four workers who were on the site, and those workers informed the Bureau that they were only being paid \$17 an hour, which was under the prevailing wage and supplement rates required for the classification of work in that jurisdiction for that project. During the interview, the workers also mentioned they worked five days a week, eight hours a day on the Project.

² Respondents failed to maintain certified payrolls for the Project or have the requisite postings required under the Labor Law, even though those requirements were outlined in the bid specifications.

rely on the information provided by the individuals involved in this case³. O'Donnell Construction was a medium sized employer who, through the contract documents associated with the Project, was clearly put on notice that the prevailing wage rate schedules applied to the work performed and how the rates listed in those schedules applied to their workers, but still failed to pay their workers correctly on the Project. I find the totality of the evidence in the record as a whole sufficient to support the Department's request that the Commissioner assess a 25% civil penalty on the underpayments and interest assessed in this case, and based on the same totality of evidence, that 16% interest per annum be assessed on all underpayment of wages and supplemental benefits due on the Project as well.

RECOMMENDATIONS

Based upon the default of the Respondents in answering or contesting the charges contained in the Department's Notice of Hearing, and upon the sworn and credible testimonial and documentary evidence adduced at hearing in support of those charges, and based upon the record as a whole, I recommend that the Commissioner of Labor adopt the within findings of fact and conclusions of law, and make the following determinations and orders in connection with the issues raised in this case:

DETERMINE that Respondents, underpaid prevailing wages and supplemental benefits to its laborers, workers and mechanics in the amount of \$56,382.08 on the Project, for the audit period week ending May 7, 2019, through week ending July 23, 2019; and

DETERMINE that Shane Clifford O'Donnell is an owner and officer of O'Donnell Construction who knowingly participated in the violation of Labor Law Article 8 on the Project at issue; and

DETERMINE that the failure of Respondents to pay the prevailing wages and supplement rates on the Project was a "willful" violation of Labor Law Article 8; and

³ Since the Bureau did not have certified payrolls to outline the time it took to perform the work on the Project, the Bureau compared the Project to similar projects of that size and scope, and workforce utilized, to determine the total time frame Project should have taken.

DETERMINE that Respondents are responsible for any underpayment of wages or supplemental benefits determined to be owed on the Project; and

DETERMINE that Respondents are responsible for interest on the total underpayments on the Project at the statutorily mandated rate of 16% per annum from the date of underpayment to the date of payment; and

DETERMINE that based on the statutory factors set forth in Labor Law Article 8, Respondents are assessed a civil penalty in the Department's requested amount of 25% of the underpayment and interest due on the Project; and

ORDER that the Bureau compute the total amount due on the Project, with interest accrued at 16% from date of underpayment to the date of payment and the 25% civil penalty owed; and

ORDER that the Respondents shall immediately remit payment of the total amount calculated by the Bureau to be due. The remittance should be made payable to the Commissioner of Labor, and sent to the Bureau at: Bureau of Public Work, New York State Department of Labor, Harriman State Office Campus, Building 12, 1st Floor, Room 130, Albany, New York 12226; 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: February 22, 2023
Albany, New York

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Marshall H. Day".

Marshall H. Day, Hearing Officer