STATE OF NEW YORK: DEPARTMENT OF LABOR

In the Matter of

SUBURBAN RESTORATION CO. INC. and
JOHN MARKOVIC, as an officer and/or shareholder of
SUBURBAN RESTORATION CO. INC.,

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 Beacon Central School District.

REPORT
&
RECOMMENDATION

Prevailing Wage Case
PRC No. 2005007995
Case ID: PW11 080007
Dutchess County

SUBURBAN RESTORATION CO. INC. and
JOHN MARKOVIC, as an officer and/or shareholder of
SUBURBAN RESTORATION CO. INC.,

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 New York State Office of General Services.

Prevailing Wage Case
PRC No. 2005006195
Case ID: PW11 080013
Rockland County

SUBURBAN RESTORATION CO. INC. and
JOHN MARKOVIC, as an officer and/or shareholder of
SUBURBAN RESTORATION CO. INC.,

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 Huntington Union Free School District.

Prevailing Wage Case
PRC No. 2006000796
Case ID: PW11 2010028067
Suffolk County

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

Pursuant to a Notice of Hearing issued on November 20, 2017, a hearing was held on November 13, 2018, in Albany, New York and New York City, New York by videoconference (HO 1).[1] Hearing dates continued throughout 2018 and into 2019, with hearings both by videoconference between Albany and other locations and with all parties present in Albany, New York. The hearing concluded on September 26, 2019. 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. When the hearing concluded, the parties were given the opportunity to submit Proposed Findings of Fact and Conclusions of Law ("Proposed Findings"). After several extensions of time, granted at the request of Prime, the New York State Department of Labor ("Department") submitted Proposed Findings on April 30, 2020. Prime did not submit Proposed Findings by the final submission deadline.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") into whether Suburban Restoration Co. Inc. ("Prime"), complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of three public work contracts. Project 1 involved a public work contract between Prime and the Beacon Central School District ("Beacon CSD") in Dutchess County for asbestos abatement work (PRC No. 20050079995).

Project 2 involved a public work contract between Prime and the New York State Office of General Services ("OGS") in Rockland County for roof maintenance at the Rockland Psychiatric Center (PRC No. 2005006295).

Project 3 involved a public work contract between Prime and the Huntington Union Free School District ("Huntington UFSD") in Suffolk County to perform alterations to the Huntington High School (PRC No. 2006000796).

[1] Documentary evidence will be referenced as follow: Hearing Officer Exhibits, HO X; Department Exhibits, DOL X; and Respondent Exhibits R X. Transcript references will be in the format: T p X or T pp X, X or T pp X – Y.

APPEARANCES

The Bureau was represented by former Department Counsel, Pico Ben-Amotz, Evan Zablow, of Counsel.

Prime appeared *pro se* and did not file an Answer to the charges incorporated in the Notice of Hearing.

ISSUES

1. Did Prime 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 Prime to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
3. Did any willful underpayment by Prime involve the falsification of payroll records?
4. Is John Markovic a shareholder of Prime who owned or controlled at least ten per centum of the outstanding stock of the Prime?
5. Is John Markovic an officer of Prime who knowingly participated in a willful violation of Labor Law article 8?
6. Should any period of the time for which interest would otherwise be assessed on any underpayments of prevailing wages and/or supplements be reduced?
7. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

The hearing concerned separate investigations made by the Bureau on three projects involving public work performed by Prime.

PROJECT 1

On or about July 1, 2006, the Bureau issued Prevailing Wage Rate Schedule 2006 for Dutchess County ("Project 1 Schedule"). The Project 1 Schedule set forth the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics

performing work on public work projects in Dutchess County from July 1, 2006 through June 30, 2007, including the laborer classification with wages of $30.80 per hour and supplements of $15.35 per hour (DOL 34)[2],[3]

On or about July 18, 2006, Prime entered into a contract with the Beacon CSD for asbestos abatement work to school district facilities in Beacon, New York. The contract for Project 1 provides that Prime must comply with prevailing wage requirements in Labor Law §§ 220 (3) and 220-D and directs Prime to consult the wage schedule included in the contract documents. The Department designated the Beacon CSD Project as PRC 2005007995 (DOL 29, 30).

On or about March 1, 2007, and September 19, 2008, the Bureau received Claims for Wage and/or Supplement Underpayment on a Public Work Project PW-4 that alleged that Prime failed to pay the proper prevailing wages and supplements to workers who performed work on the Project 1 by paying workers $24 per hour (DOL 26, 26A).

On or about March 7, 2008, the Bureau issued to Prime a request for records for Project 1 with a return date of ten calendar days from receipt by Prime of the request (DOL 27).

On or about September 9, 2008, Prime provided a certified payroll report relating to the Beacon CSD Project (DOL 28).

On or about October 31, 2008, Prime provided documents titled Business Banking Statement. These Statements are copies of various checks that Prime allegedly issued to various parties from June 1, 2006, to January 31, 2007 (DOL 8-15) along with a note for most checks (DOL 16-19) (hereinafter collectively referred to as "Statements"). The Statements did not include any paystub information including the hourly wage or supplements paid to the workers, the hours worked by the workers, which projects the work occurred on, or any withholding or tax deductions (DOL 8-19).

[2] Many of the Department's exhibits were received into evidence pursuant to the testimony of Public Work Wage Investigator Wendell Walwyn. Subsequent to his direct testimony, Mr. Walwyn became unavailable for cross-examination by Respondent, rendering that portion of his testimony on which Respondent could not cross-examine without weight for purposes of this Report and Recommendation. However, later testimony by Department Senior Public Work Wage Investigator Daniel McCormack confirmed that the Department's exhibits were documents in the possession of the Department and could therefore be received in evidence pursuant to State Administrative Procedure Act Section 306.2: "All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record…"

[3] The transcript of this proceeding occasionally misidentifies Investigator Walwyn as "Wallrine."

The Bureau relied upon the Claims and Prime's certified payrolls to determine the days and hours worked by three workers (DOL 26, 26A, and 28).

The Bureau classified the workers on the Beacon CSD Project as laborers because of the nature of the work, the workers' allegations on the Claims, and Prime's classification of the workers as laborers on its certified payroll report (DOL 26, 26A, 28, 30, and 34).

The workers' Claims that they were paid $24 an hour are consistent with Prime's Statements. Prime's certified payroll reports show wages and supplemental benefits inconsistent with the amounts shown on the Statements. Additionally, when the amounts Prime paid its workers on the 2006 Statements are divided by the hours those workers worked, the result is a wage of $24 an hour (DOL 20). For these reasons, the Bureau found that certified payroll reports that Prime submitted for 2006 were not credible (DOL 20; T pp. 1194, 1195; 1197-1204).

Prime's witness stated that workers on Project 1 were paid $24 per hour (T p 980).

Former employee Alexander Chojecki stated that he received $24 per hour on Project 1, with no supplemental benefits (T p 447, 481).

Prime's records revealed that Prime employed workers from the Project 1 at another project the same week (DOL 26, 26A, 28).

During week ending November 12, 2006, Prime performed work on Project 1 and on a project at the Bronx Psychiatric Center in the Bronx, New York. On or about March 1, 2007, and September 19, 2008, the Bureau received Claims that alleged that Prime failed to pay the proper prevailing wages and supplements to workers who performed work at the project at the Bronx Psychiatric Center. The Bureau received and used certified payroll reports for the project that Prime performed at the Bronx Psychiatric Center (DOL 32, 33).

The Bureau credited Prime for making certain payments to the workers. Those payments were the wages the workers alleged they were paid for each hour worked, e.g., a credit of $432 when the worker claimed he received $24 an hour and worked sixteen hours regular time and two hours overtime (DOL 31).

The Bureau prepared a Detail of Underpayments for Project 1, finding underpayments of prevailing wages and/or supplements to three workers in the amount of $2,055.95 (DOL 31)

PROJECT 2

On or about July 1, 2005, the Bureau issued Prevailing Wage Rate Schedule 2005 for Rockland County ("Project 2 Schedule"). The Project 2 Schedule 2005 detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on public work projects in Rockland County from July 1, 2005 through June 30, 2006. The Prevailing Wage Rate Schedule 2005 for Rockland County included the roofer classification with wages of $32.08 per hour and supplements of $21.57 per hour (DOL 22).

On or about August 31, 2005, Prime entered into a contract OGS to perform roof maintenance to Building 54 at Rockland Psychiatric Center in Orangeburg, New York. (DOL 5) The Department designated the Rockland PC Project as PRC 2005006195 (DOL 4).

The Rockland PC Project included securing and/or replacing defective slate roof tiles and the asbestos underneath the tiles (DOL 4, 7, 5).

On or about March 1, 2007, the Bureau received a Claim for Wage and/or Supplement Underpayment on a Public Work Project PW-4 ("Claim") that alleged that Prime failed to pay the proper prevailing wages and supplements to workers who performed work on the Rockland PC Project (DOL 1).

The Claim contained allegations that the workers were paid $20 an hour for all work performed on the Rockland PC Project (DOL 1).

Pursuant to the Claim, on or about August 20, 2008, the Bureau issued to Prime a request for records for the Rockland PC Project with a return date of ten calendar days from the receipt by Prime of the request (DOL 2).

By a letter dated October 30, 2008, Prime informed the Bureau that it did not possess "the relevant documents for the 2005 tax year." (R 22).

On or about March 17, 2009, Prime provided a certified payroll report relating to the Rockland PC Project for week ending August 21, 2005, through week ending September 25, 2005 (DOL 3).

Prime witness Collette Markovic admitted that the payrolls, which she prepared and which Prime certified and submitted to the relevant agency of jurisdiction, were inaccurate (DOL 3; T pp. 1662-67, 1680-82).

The Bureau used multiple documents to conduct its audit, including Prime's certified payrolls, the worker Claim, the OGS labor rate worksheet, and the OGS daily labor report, finding that Prime employed three workers on Project 2 (DOL 1, 3, 6, 7; T pp 1180, 1181).

When the Bureau investigator found a conflict among the Claim, certified payroll and OGS daily labor report, the investigator gave deference to the data regarding hours worked in the OGS daily labor report because the OGS daily labor report was a contemporaneous record that was signed by both the Prime and the Engineer in Charge for OGS. (T pp. 1181-83)

The Bureau classified the workers on Project 2 as roofers because of work performed as set forth in the PW 39 prevailing rate screenshot and contract documents, the allegations in the Claim, and Prime's classification as roofers on the certified payroll report, OGS labor rate worksheet, and OGS daily labor report (DOL 1, 3, 4, 5, 6, 7; T p. 1184-86)

The Bureau analyzed the Statements that Prime submitted for 2006 and found that the Statements supported the workers' claims that they were paid $24 an hour in 2006. While these Statements did not contemplate the relevant time periods for the Project 1 (2005), they did corroborate the claimants' allegations on the 2006 projects thereby lending credibility to the claimant's allegations that they were paid $20 for 2005 during the Rockland PC Project (DOL 20).

Collette Markovic stated that Prime paid workers on Project 2 less than the prevailing wage. Mrs. Markovic admitted that she knew of the Labor Law's requirements and that she did not comply with them because she was negligent and did not take them seriously. (T pp. 1666-73; 1680-82)

The Bureau, in its audit, credited Prime for making certain payments to the workers. Those payments were the wages the workers alleged they were paid for each hour worked, e.g., a credit of $800 when the worker claimed he received $20 an hour and worked forty hours (DOL 21).

On or about November 2, 2009, the Bureau issued to Prime a Notice of Labor Law Inspection Findings notifying Prime of the Bureau's findings with respect to Project 2 (DOL 24).

The Bureau prepared a Detail of Underpayments for Project 2, which found that Prime underpaid prevailing wages and/or supplements to three workers in the amount of $17,767.20 (DOL21).

PROJECT 3

On or about July 1, 2005, the Bureau issued Prevailing Wage Rate Schedule 2005 for Suffolk County ("Project 3 Schedule 2005"). Project 3 Schedule 2005 detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on public work projects from July 1, 2005 through June 30, 2006, including the laborer classification with wages of $25.50 per hour and supplements of $9.91 per hour (DOL 46).

On or about July 1, 2006, the Bureau issued Prevailing Wage Rate Schedule 2006 for Suffolk County ("Project 3 Schedule 2006"). Project 3 Schedule 2006 detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on public work projects from July 1, 2006 through June 30, 2007, including the laborer classification with wages of $27.00 per hour and supplements of $9.91 per hour, the laborer building classification with wages of $25.50 per hour and supplements of $9.91 per hour, the carpenter classification with wages of $45.66 per hour and supplements of $25.01 per hour, the asbestos worker classification with wages of $26.45 per hour and supplements of $8.25 per hour, and the insulator classification with wages of $43.61 per hour and supplements of $25.62 per hour (DOL 46).

On or about August 18, 2006, Prime entered into a contract with the Huntington UFSD for Project 3, to perform alterations to Huntington High School in Huntington, New York. The Department designated Project 3 as PRC2006000796 (DOL 42 and 39).

On or about March 1, 2007, the Bureau received two Claims that alleged that Prime failed to pay the proper prevailing wages and supplements to workers who performed work on Project 3. The Bureau then received two additional Claims from workers who worked on Project 3 (DOL 37A, 37C, 37, 37B).

The Claims contained allegations that the workers on Project 3 were paid $24 an hour (DOL 37, 37A, 37B, 37C)

In response to the Claims, on or about December 9, 2010, the Bureau issued to Prime a request for records for the Project 3 with a return date of ten calendar days from receipt by Prime of the request. (DOL 40).

Huntington UFSD provided the Bureau with, among other things, two certified payroll reports from Prime: one from week ending July 23, 2006, through July 30, 2006; and another from week ending August 27, 2006, through week ending October 15, 2006 (DOL 41 and 44).

At the hearing, Prime submitted into evidence a copy of the certified payroll report Prime claimed to have submitted to Huntington UFSD during the Huntington UFSD Project (R 19).

Discrepancies between R 19 and the payroll reports submitted to the Bureau by Huntington UFSD (DOL 41 and 44) include the fact that "N/A" was entered for all deductions on DOL 41 and 44, but deductions were entered on R 19 and that the hours worked and total gross wages for week ending July 23, 2006, on DOL 41 (bates page 0514) and R 19 were different. When questioned Collette Markovic stated that both documents, though they contained different entries, were "correct." Ms. Markovic also stated that she did now know what she did on the payrolls and that she made a mistake (T pp. 929 - 967).

Ms. Markovic testified that the reason for some of the differences between payrolls was because the workers worked at another project during the same week ending and that she included the hours from that other project on DOL 41, but did not include them on R 19. Mrs. Markovic was not able to identify the other project (T pp. 940-49; 954-55).

However, for week ending November 12, 2006, Prime employed workers on at least two projects: one in Beacon; another in the Bronx. A review of the relevant payroll records demonstrates that Prime made deductions on the Beacon project, but not for the Bronx project. Prime claimed that R 18 contained the combined gross wages, deductions, and net wages paid to the workers for the week ending November 12, 2006, for the Beacon and the Bronx projects. However, the amount of deductions on R 18 is different than the amount of deductions on the two payrolls for that project (DOL 28 and 33; R 18; T pp. 968-970).

Additionally, R 19 contains mathematical errors e.g., the gross amounts earned for the workers in week ending July 23, 2006, should be $1,571.91 instead of $1,860.82 for thirty-three hours worked and $904.97 instead of $1,689.74 for nineteen hours worked (T pp. 943-948).

Project 3 included asbestos abatement, tile installation, and floor removal and installation (DOL 37A, 43; T p 595).

The Bureau relied upon the Claims and the Huntington UFSD's copy of the certified payroll report to determine that Prime employed six workers on Project 3 (DOL 37, 37A, 37B, 37C, 41, 44).

During 2006, Marek Golebiewski, an employee of Prime, kept and contemporaneously maintained a calendar of the hours that he worked for Prime (DOL 38; T pp. 587-588).

The Bureau relied upon the Claims, the Huntington UFSD's copies of the certified payroll report, and Marek Golebiewski's 2006 calendar to determine the days and hours worked by Prime's six workers on the Huntington UFSD Project (DOL 37, 37A, 37B, 37C, 38, 41, 44, pp. 0623-0632.

At hearing, Marek Golebiewski and Alexander Chojecki's testimony corroborated the Bureau's conclusions (T p. 589-595, 435).

The Bureau classified the workers on the Beason CSD Project as laborers, laborer buildings, carpenters, asbestos workers, and insulators because of thework involved asbestos abatement and floor and tile installation, the workers' allegations in the Claims, and Prime's classification of the workers on the certified payroll report that it submitted to the Huntington UFSD (DOL 42, 37, 37A, 37B, 37C, 41, 44 pp. 0623-0632).

Marek Golebiewski testified concerning the type of work, hours worked, and pay rate received on Project 3 (T pp. 589-595).

The Bureau determined that the workers on Project 3 were paid $24 an hour based upon the workers' Claims that they were paid $24 an hour and the Statements. The amounts the workers were paid on the 2006 Statements did not correlate with any amount allegedly paid on the certified payroll reports. Additionally, when the amounts Prime paid its workers on the 2006 Statements are divided by the hours those workers worked, the result is a wage of $24 an hour (DOL 20). Given these unexplained differences, the Bureau found that certified payroll reports that Prime submitted for 2006 were not credible (T pp. 602, 1191-95, 1198-1204).

Ms. Markovic admitted that Prime paid the workers on Project 3 $24 an hour (T pp. 976-986).

Marek Golebiewski and Alexander Chojecki testified that they receive $24.00 per hour on Project 3 600-602, 440, 444, 447, 481-482)

In its Detail of Underpayments, the Bureau credited Prime for paying the workers $24.00 for each hour worked, e.g., a credit of $960 when the worker claimed he received $24 an hour and worked forty hours regular time. (DOL 31, 45 p. 0637)

On or about November 13, 2017, the Bureau issued Prime a Notice of Labor Law Inspection Findings notifying Prime of the Bureau's findings with respect to the Project 3 (DOL 36).

The Bureau prepared a Detail of Underpayments finding that Prime underpaid prevailing wages and/or supplements to three workers on Project 3 in the amount of $24,159.17 (DOL45).

During the time that work was performed on each of the Projects at issue, John Markovic was president of Prime, as shown on the PW-15 Contractor Profile that Prime submitted to the Bureau and on each of the certified payrolls. John Markovic also signed the contract agreements as president for each Project (DOL 50, 3, 28, 41, 5, 30, 42).

Miroslav Tyszka testified that during the summer of 2006, he was present for a conversation between representatives of Prime during which Prime agreed to increase the workers' pay from $20 an hour to $25 an hour (DOL 112-13, 124).

The Bureau concluded that the workers who did not submit Claims on the three projects at issue also received $20 an hour in 2005 and $25 an hour in 2006 because there was no evidence of what those other workers were paid (DOL 21; T pp. 1191-93).

Prime is an experienced public work contractor in that it has performed at least thirty - three public work projects starting as far back as 1991 (DOL 25).

John Markovic and Collette Markovic knowingly participated in Prime's failure to pay or provide prevailing wages and supplements to or for the benefit of the employees who performed work on the three Projects at issue.

CONCLUSIONS OF LAW

MOTION TO DISMISS

Early in this proceeding, Prime made a Motion to Dismiss, arguing that the Bureau's failure to issue certain documents within a time frame of three years rendered the Bureau time-

barred from its investigations. While not clear exactly which documents Prime claims were not timely issued, this Motion fails because no such statute of limitations exists within Labor Law Article 8. While there is a statute that concerns how long after work on a project concludes that an investigation must commence, that is not the issue raised by Prime. Furthermore, given that Prime appeared pro se, and assuming *arguendo,* that Prime meant allege a violation of the statute of limitations found in Labor Law Article 8, I find no violation of same. Accordingly, Prime's Motion to Dismiss is Dismissed.

JURISDICTION OF ARTICLE 8

New York State Constitution, article 1, § 17 mandates the payment of prevailing wages and supplements to workers employed on public work projects[4]. 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 [1999]). Labor Law § 220.2 establishes that the law applies to a contract for public work to which the State, a public benefit corporation, a municipal corporation or a commission appointed pursuant to law is a party. 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.

In 1983, the New York State Court of Appeals established what was until recently the test for whether a project was subject to the Labor Law public work provisions. *Matter of Erie County Indus. Dev. Agency v. Roberts*, 94 A.D.2d 532 (4th Dept. 1983), affd 63 N.Y.2d 810 (1984). *Erie* involved a construction contract on a project financed by an industrial development agency, and established the now-familiar two-prong test:

> (1) the public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics, and (2) the contract must concern a public works project. *Id at 537.*

[4] This section derives ultimately from the 1905 amendment of section 1 of article XII of the New York State Constitution of 1894.

In 2013, the New York State Court of Appeals adopted a new, 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 (2013). The Court states this 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 at 538.*

The Departments of Jurisdiction in the three Projects are public entities and are parties to the instant public work contracts. The contracts involved construction-like labor paid for by public funds. Finally, the work products are clearly for the use or other benefit of the general public. Labor Law article 8 applies. (Labor Law § 220 (2); *Matter of Erie County Industrial Development Agency v Roberts,* 94 AD2d 532 [1983], *affd* 63 NY2d 810 [1984]).

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 [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 [2006], *lv denied*, 8 NY3d 803 [2007]; *Matter of CNP Mechanical, Inc. v Angello*, 31 AD3d 925, 927 [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,* 289 AD2d 665 [1992], *lv denied*, 80 NY2d 752 [1992]).

The record contains ample evidence from the workers, the contract documents, Prime's payrolls, and investigator testimony to justify the classifications used. Furthermore, I note that Prime did not challenge the Bureau's classifications.

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 [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 [1999]; *Matter of Alphonse Hotel Corp. v Sweeney*, 251 AD2d 169, 169-170 [1998]).

Testimony from the workers, the conflict among multiple documents created by Prime, and Prime's own bookkeeper's testimony all call into question the reliability of Prime's payroll records. Notwithstanding Prime's claims that it always paid the appropriate rates, I find that testimony unconvincing in light of the above, making the Bureau's methods for calculating the underpayments the most reasonable in light of the record as a whole.

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, 927 [2006], *lv denied*, 8 NY3d 802 [2007]).

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).

In this matter, Consequently, Prime 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.

However, interest should be waived for a total of seven years for the following reasons. First, the Department's witness Wendell Walwyn testified that the files in this matter were sent from the Bureau to the Department's Counsel's Office in 2011, returned to the Bureau at some point, then re-sent in 2017, a period of unexplained inactivity that lasted for six years (T pp 341 – 343)[5] Additionally, the completion of this Report and Recommendation was held in abeyance for approximately one year as a result of the pandemic and its impact on the Department's overall operations, including those of this office.

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

[5] As stated previously I have granted Mr. Walwyn's testimony almost no weight because, as stated above, most of that testimony concerns alleged violations of Article 8 by Respondent, and Respondent was denied the opportunity to cross-examine Mr. Walwyn. However, in the case of the testimony cited here, it actually benefits Respondent by reducing the amount of interest owed on any underpayments and thus is unlikely to have been contested by Respondent on cross. Furthermore, the Department offered no evidence explaining the considerable delays between investigation and prosecution in this matter.

because Labor Law § 220-b (3) (b) (1) [6] 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 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 [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 [1992]; s*ee also, Matter of Otis Eastern Services, Inc. v Hudacs*, 185 AD2d 483, 485 [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 AD2d 510 [1988]; *Matter of Cam-Ful Industries, supra)* An inadvertent violation may be insufficient to support a finding of willfulness; the mere presence of an underpayment does not establish willfulness even in the case of a contractor who has performed 50 or so public works projects and is admittedly

[6] "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.

familiar with the prevailing wage law requirement. (*Matter of Scharf Plumbing & Heating, Inc. v Hartnett*, 175 AD2d 421 [1991]).

The violations here can only be considered willful. The weight of the evidence in the record as a whole demonstrates that Prime knew of the requirements to pay the prevailing rate of wages and supplements on public work projects and that it did not do so.

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. The definition of the word falsify generally involves the intent to misrepresent or deceive ("falsify." *Merriam-Webster*, 2011, 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, 537-538; *Quotron Systems v. Gallman*, 39 NY2d 428, 431 (1976).

It is clear from the record that Prime failed to meet its obligation to maintain true and accurate payroll records, and I find, especially in light of Prime's bookkeeper's testimony, that the willful failure to pay or provide prevailing wages and/or supplements involved the falsification of payrolls.

PARTNERS, SHAREHOLDERS OR OFFICERS

Labor Law § 220-b (3) (b) (1) further provides that any such contractor, subcontractor, successor, or any substantially owned-affiliated entity of the contractor or subcontractor, or 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, or any officer of the contractor or subcontractor 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. John Markovic was president of Prime, signed various documents, and was involved in the Projects. As such he was an officer who knowingly violated Article 8.[7]

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. Prime appears to have had previous experience with public work projects. There is no evidence of a history of violations. The number of workers involved was small. In light of these facts, I find a penalty of 15% is appropriate.

RECOMMENDATIONS

Based upon the weight of the evidence set forth in the record as a whole, 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 on each of the Projects in the amounts as follows: Project 1, $2,055.95; Project 2 $17,767.20; Project 3 $24,159.17; and

[7] Department counsel inexplicably also requests a finding that Ms. Markovic was also an officer of Respondent who knowingly violated Article 8. However, as there is no evidence in the record that Ms. Markovic was anything other than a bookkeeper for Respondent, such a finding would be incorrect and is not made here.

DETERMINE that Prime 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; however, due to delays attributable solely to the Department such interest shall be **WAIVED** for a period of seven years; and

DETERMINE that the failure of Prime to pay the prevailing wage or supplement rate was a "willful" violation of Labor Law article 8; and

DETERMINE that the willful violation of Prime did involve the falsification of payroll records under Labor Law article 8; and

DETERMINE that John Markovic is an officer of Prime; and

DETERMINE that John Markovic knowingly participated in the violation of Labor Law article 8; and

DETERMINE that Prime be assessed a civil penalty in the amount of 15% of the underpayment and interest due; and

ORDER that the Bureau compute the total amount due (underpayment, interest less the waiver of seven years, and civil penalty); and

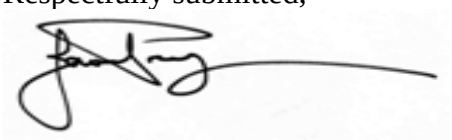
ORDER that Departments of Jurisdiction remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau; and

ORDER that if any withheld amount is insufficient to satisfy the total amount due, Prime, 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: March 22, 2021
Albany, New York

Respectfully submitted,



Jerome Tracy, Principal Hearing Officer