STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

GARY McDOWELL, SR., d/b/a GM CONSTRUCTION & LAWN CARE SERVICE

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 known as the sidewalk replacement project for the City of Salamanca

REPORT & RECOMMENDATION

Prevailing Rate Case No.
Case No. 2010004449
PW 03 2010022373

Cattaraugus County

To: Honorable Peter M. Rivera
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held by videoconference between Albany and Buffalo, New York on October 18, 2012. 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.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether Gary McDowell, Sr., d/b/a/ GM Construction & Lawn Care Service (“McDowell “) complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a contract involving sidewalk replacement (“Project”) for the City of Salamanca in Cattaraugus County, New York (“Department of Jurisdiction”).

APPEARANCES

The Bureau was represented by Acting Department Counsel, Pico Ben-Amotz (Louise Roback, Senior Attorney, of Counsel). McDowell appeared *pro se* and did not file an Answer to the charges incorporated in the Notice of Hearing**.**

ISSUES

1. Did McDowell 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 McDowell to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
3. Did any willful underpayment involve the falsification of payroll records?
4. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

The Project involved the removal of 130 sidewalk blocks in areas around the City of Salamanca and the replacement of those sidewalks blocks with concrete (T. 15-16; Dept. Ex. 3). On May 24, 2010, the City of Salamanca issued a Notice of Sealed Bids, which included a Prevailing Wage Rate Schedule ("PRS") (T. 16-18; Dept. Ex. 4). On or about July 22, 2010, the City of Salamanca entered into a contract with McDowell to furnish labor, material and equipment necessary to perform work on the Project (T. 18; Dept. Ex. 5).

On or about September 8, 2010, the Bureau received a complaint from Michael Perkins, asserting that he did not receive prevailing wages on the Project (T. 10; Dept. Ex. 1). Bureau Investigator James Tyzka was assigned to investigate this matter (T. 10). Mr. Perkins claimed that he was paid for only half of the hours he worked and that he was not paid any supplemental benefits (T. 10-11; Dept. Ex. 1). The complaint includes Mr. Perkins' pay stubs (T. 12; Dept. Ex. 1). Mr. Perkins told the investigator that another worker, Chad Whitcher, was similarly paid (T. 12).

McDowell conducts business under the assumed business name of GM Construction & Lawn Care (T. 12-13; Dept. Ex. 21). On October 5, 2010, the Bureau sent a records request to McDowell and the City of Salamanca (T. 13-14; Dept. Ex. 2). In response, McDowell provided payroll journals (T. 23; Dept. Ex. 9). The City of Salamanca also provided payroll journals that were certified by McDowell as being true and accurate (T. 19-23, 73-74; Dept Exs. 7 & 8). The records provided by McDowell included an additional week not in the records provided by the City of Salamanca (T. 23, 73). On or about December 4, 2010, McDowell certified that the payroll records were accurate for the entire project, which ran from July 12, 2010 through

August 25, 2010 (T. 24-25, 74; Dept Ex. 10). McDowell also submitted time sheets showing his employees' work hours (T. 25; Dept. Ex.11). The time sheets are false as they underreport hours worked and falsely report the hourly rate paid (T. 26). McDowell submitted to the Bureau copies of cancelled checks evidencing payments to workers on the Project (T. 27; Dept. Ex. 12).

The Project required workers to perform tasks that were covered by the Laborer, Mason and Operating Engineer classifications (T. 34-36, 42-43; Dept. Ex. 15). The PRS for the Project covers Cattaraugus County for the time period July 1, 2010 to June 30, 2011 (T. 19, 92-93; Dept. Ex. 6). The PRS detailed the amount of wages and supplements which were to be paid to or provided for the workers performing work on the Project from July 1, 2010, to June 30, 2011, in the those classifications.[1]

Investigator Tyczka prepared a spreadsheet comparing the hours listed on the various time records to assist him in preparing his audit of the days and hours worked and gross pay (T. 28-32; Dept. Ex. 14). Kurt Slocum, the foreman on the job, maintained daily time records (T. 11, 13; Dept. Ex. 1). The time records he provided did not match the payroll records. The Bureau determined that the time records Mr. Slocum maintained accurately reported the hours worked; not the payrolls submitted by McDowell (T. 29-31; Dept. Ex. 14).

Utilizing the information that was provided, the investigator prepared an audit (T. 32-33; DOL Ex. 15). In preparing his audit, the investigator used the gross pay set forth in the payroll journals since the gross pay matched the canceled checks submitted by McDowell (T. 31-32). In order to determine the rate of pay required to be paid pursuant to the PRS, the investigator had to classify the work according to the various tasks performed. The Project consisted of the removal of the concrete sidewalk, which was done by hand, and is classified as the work of a Laborer A (T. 34). After the concrete was removed, workers put forms into place for the pouring of the concrete, which is classified as Laborer B work (T. 34). After the forms were in place, the workers poured concrete into the prepared areas, which is classified as Laborer A work (T. 35).

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[1] The following classifications in the PRS applied to the Project: Laborer – Heavy & Highway (Group A), with wages of $23.29 per hour, and supplements of $14.40 per hour; Laborer – Heavy & Highway (Group B), with wages of $23.69 per hour, and supplements of $14.40 per hour; Mason – Heavy & Highway (Cement Mason), with wages of $28.22 per hour, and supplements of $17.24 per hour; and Operating Engineer – Heavy & Highway (Class B), with wages of $26.46 per hour, and supplements of $23.79 per hour (and wages of $69.66 per hour double time, and supplements of $30.84 per hour double time) (Dept. Ex. 6).

The concrete then had to be finished, which is classified as the work of a Cement Mason (T. 34, 35). Workers who assisted the masons were also performing tasks in the mason job classification (T. 35).

The investigator explained in detail the methodology he used in preparing the audit (T. 33-92).[2] Generally, the investigator's methodology for allocating job classifications in the audit depended on the number of hours worked in a particular day. For a ten-hour work day, he applied more time to Laborer B for form setting than Laborer A (T. 46-47). He reduced the Laborer B time if the work day was less than ten hours (T. 46-47). There were two days of work for an Operating Engineer to grind tree roots (T. 42-43). This work was performed on two different Sundays (T. 43). Operating Engineers working on Sunday are entitled to be paid at double rate (T. 44).

Mr. Slocum told the Bureau investigator that Michael Perkins and Chad Whitcher did the removal of the concrete and placement of the forms, and that Mr. Perkins also did concrete finishing (T. 52-55). Mr.Slocum told the investigator that he was the main cement finisher on the Project (T. 53). Mr. Slocum told the investigator that Jared Murphy and David Kennedy worked only on the removal and placement of concrete, and did not make forms or finish the concrete (T. 52).

Based upon the investigator's conversations with Mr. Slocum, and Michael Perkins' complaint, the Bureau determined that Mr. Perkins performed work in three job classifications: Laborer A, Laborer B and Cement Mason (T. 52). The investigator explained in detail his methodology for preparing the audit with respect to Michael Perkins (T. 53-58).[3] A comparison

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[2] Specifically, the investigator used the following methodology for allocating job classifications for a ten hour day: five hours for Laborer A, three hours for Laborer B, and then two hours Laborer A overtime (T. 47-48). The investigator allocated five hours for the removal of the concrete, three hours for forming the sidewalk, and then two hours for placing the concrete (T. 48-49). For shorter days, such as 7-1/2 hours on August 11 and 12, 2010 for Chad Whitcher, the investigator allocated six hours as Laborer A, for the removal and replacement of concrete, and 1-1/2 hours at Laborer B for the forming of the sidewalk (T. 49-50). This would be: four hours for removal of the concrete, two hours for replacement (all Laborer A), and 1-1/2 hours for setting forms (Laborer B) (T. 51). For an eight-hour day, the investigator added ½ hour for setting forms (T. 52).

[3] Mr. Perkins is on the audit for two hours for Sunday, July 25, 2010 at Laborer A (T. 53; Dept. Ex. 15). This is based on the time card and is reflected on the investigator's spreadsheet (T. 53; Dept. Exs. 1 & 14). For Monday, July 26, 2010, Michael Perkins is on the audit for 10-1/2 hours (T. 54). His time is allocated at five hours at Laborer A for the removal of and replacement of concrete, three hours for setting forms, one hour of Cement Mason, and the remainder of overtime as Laborer A (T. 53-54). The investigator allocated the time among the job classifications based on his personal experience doing the work (T. 54). The investigator prepared the audit for

of Mr. Perkins time card against the payroll journals corroborates Mr. Perkins' claim that he was only paid for half the time he worked. For Mr. Perkins' week ending August 7, 2010 the time card (Dept. Ex. 1) shows 40 hours worked, while the payroll journal (Dept. Ex. 8) reports he worked 19 hours at the rate of $37.69 per hour (T. 55-56). Mr. Perkins was not paid $37.69 per hour; he was paid half of that amount (.T 56-57). The investigator used the gross pay reflected in the payroll journal in preparing his audit (T. 57). The payroll journal is false and underreports hours worked (T. 56).

McDowell provided no supplemental benefits except through direct payment to workers in their paychecks (T. 59-63). There are only two documented instances in which McDowell paid wages above the prevailing wage rates, which could then be applied to supplements due (T. 63). McDowell provided no benefit plan to its employees (T. 63).

Based on the aforesaid methodology, the investigator prepared an audit dated June 28, 2011, for weeks ending July 24, 2010 through August 28, 2010 (T. 66; Dept. Exs. 15 & 16). The total wages and supplements shown due on the Project as reflected in the initial audit summary were $13,112.82 (Dept. Ex. 16). Although the Bureau issued a Notice to Withhold Payment to the City of Salamanca (T. 69-70; Dept. Ex. 19), the City has acknowledged that it is withholding no money on the Project (T. 70-71; Dept Ex. 20).

At the hearing, Mr. McDowell asserted that the audit was incorrect because his payroll period ran from Wednesday to Tuesday, rather than the Saturday week ending adopted by the Bureau, which resulted in the Bureau having failed to give credit for wages paid during one week (T. 84, 88-89). Mr. McDowell also represented that he had concrete delivery slips which had not previously been provided to the Department, which would assist in determining when concrete finishing was performed based on the days and time of day concrete was delivered to the Project.

After the hearing was concluded, the investigator was provided with the concrete delivery slips. He then revised the audit as of November 14, 2011, in the manner described in his affidavit which accompanied the audit transmittal. The investigator's affidavit, revised audit, audit

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Michael Perkins for the remainder of the week ending July 31, 2010 in the same manner, except for July 29, 2010 (T. 54). On July 29, 2010, Michael Perkins worked only eight hours (T. 54). The investigator classified him as Laborer A for five hours, Laborer B for two hours, and Cement Mason for one hour for helping finish the concrete (T. 54). The investigator prepared the remainder of the audit as to Michael Perkins in substantially the same manner as he did for the week ending July 31, 2010 (T. 55).

summary, and concrete delivery slips were received into evidence post-hearing as Department Exhibits 22 through 25, respectively. The investigator revised the audit in two respects: (1) he used Tuesday week ending dates, and (2) he utilized the newly-submitted concrete delivery tickets information (Dept. Ex 22). The use of Tuesday week ending records had the effect of eliminating a zero credit for wages paid which had been applied in the second week of the audit (Dept. Ex. 22). The revised audit now contains all contractor payments indicated on the payroll journals (*Id*.). The use of the concrete delivery tickets resulted in the following changes in the audit: (1) the mason job classification was removed on days when there were no deliveries of concrete; and (2) time determined worked in the Mason classification was reduced when concrete was delivered early in the day (Dept Ex. 22). The final revised audit reflects a total wage and wage supplement underpayments of $7,232.83 (*Id*.).

CONCLUSIONS OF LAW

JURISDICTION OF ARTICLE 8

New York Constitution, article 1, § 17, 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 AD2d 870, 871-872 [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 Salamanca is a party to the instant public work contract, which confers a public benefit, 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 Department's determination that the tasks performed on the Project were covered by the Laborer, Mason and Operating Engineer classifications is appropriate and is not disputed by the Respondent.

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]).

Having determined that the McDowell's payroll records were inaccurate and false, the Department relied on the foreman's daily time records, concrete delivery tickets and employee statements, which together constituted the best evidence available to it, to estimate the hours actually worked in various classifications. The methodology is 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 AD3d 925, 927 [2006], *lv denied*, 8 NY3d 802 [2007]). Consequently, McDowell 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.

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) provides, among other things, that when <u>two final determinations</u> 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]).

McDowell underreported the actual hours employees worked in the payroll journal in order to exaggerate the hourly rate purportedly paid to them. This clearly demonstrates a willful violation of the Labor Law.

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. The definition of the word falsify generally involves the intent to misrepresent or deceive ("falsify." *Merriam-Webster*, 2012, http://www.merriam-webster.com/dictionary/falsify). 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. It is clear from the record that McDowell underreported hours worked so that he could inflate the wage rate reported in his payroll journal. This is an obvious effort to deceive a reviewer of those records of the actual inadequate rate being paid. As such, the willful underpayment of wages involved the falsification of payroll records.

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.

Although McDowell is not a large employer, the falsification of payroll records in an effort to conceal the willful underpayment of prevailing wages is a serious violation of the labor law, which further demonstrates a lack of good faith and warrants the imposition of Department's requested civil penalty of twenty percent (20%) of the total amount due.

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 McDowell underpaid wages and supplements due the identified employees in the amount of $7,232.83; and

DETERMINE that McDowell 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; and

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

DETERMINE that the willful violation of McDowell involved the falsification of payroll records under Labor Law article 8; and

DETERMINE that McDowell be assessed a civil penalty in the Department's requested amount of 20% of the underpayment and interest due; and

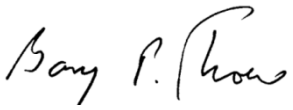
ORDER that the Bureau compute the total amount due (underpayment, interest and civil penalty); and

ORDER that upon the Bureau's notification, McDowell shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at the State Office Building, 65 Court Street, Room 201, Buffalo, NY 14202; 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: May 30, 2013
Albany, New York

Respectfully submitted,



Gary P. Troue, Hearing Officer