STATE OF NEW YORK: DEPARTMENT OF LABOR
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In the Matter of

KEY CONSTRUCTION, LLC, and
LARRY WEINSTEIN as an officer and/or shareholder
of KEY CONSTRUCTION, LLC,

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 Nyack Housing Assistance Corp.
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REPORT & RECOMMENDATION

Prevailing Wage Rate
PRC No. 2006002186
Case ID: PW11 09001192

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

Pursuant to a Notice of Hearing issued on January 19, 2016, a hearing was held on April 27, 2016, in Albany, New York and White Plains, New York by videoconference. 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 Key Construction, LLC, ("Prime"), complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a contract involving the construction of affordable housing ("the Project") for the Village of Nyack Housing Authority ("Department of Jurisdiction") [1].

[1] The Department of Jurisdiction is established pursuant to Public Housing Law article 3, Municipal Housing Authorities.

APPEARANCES

The Bureau was represented by Department Counsel, Pico Ben-Amotz (Elina Matot, Senior Attorney, of Counsel).

Prime appeared *pro se* filed 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. Is Larry Weinstein a shareholder of Prime who owned or controlled at least ten per centum of the outstanding stock of the Prime?
4. Is Larry Weinstein an officer of Prime who knowingly participated in a willful violation of Labor Law article 8?
5. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

The hearing concerned an investigation made by the Bureau on a project performed by Prime. On or about December, 2008, the Department of Jurisdiction entered into an Amended Ground Lease Agreement ("Lease") with the Nyack Housing assistance Corporation (hereinafter "NHAC") for the lease of land owned by VNHA to NHAC for the purpose of allowing NHAC to develop affordable housing, with occupancy preference to be given to applicants with at least one family member who is mobility impaired. (DOL 5)[2]

[2] The Lease referenced a series of prior leases between the same parties, entered into on April 19, 2005, October 18, 2005, and November 21, 2006.

NHAC is a domestic not-for-profit corporation; the initial filing date shown for NHAC is November 14, 1979, as shown in the New York State Department of State's Division of Corporations database.[3]

The Department of Jurisdiction owned the property that it leased to NHAC. The Lease specified the number of units to be developed, and required the approval of the Department of Jurisdiction for all plans and specifications. The Lease further provided that all buildings constructed revert to the Department of Jurisdiction upon the termination of the Lease, that the Department of Jurisdiction will provide maintenance and management of the improvements, and that the Department of Jurisdiction may terminate the Lease upon 120 days notice and take possession of the real property and all improvements. The Lease also contained an agreement that the Department of Jurisdiction shall make payments in lieu of taxes to the municipalities who have taxing authority. The Department of Jurisdiction received yearly rent for the property and received a monthly payment based in part on the net profits from the rental of the not yet constructed units (Dept. Ex. 5).

On or about December 5, 2007, Prime entered into a contract with NHAC to furnish materials, labor, tools and equipment necessary for the construction of multifamily residential buildings located in the Village of Nyack, County of Rockland, on the land that was the subject of the Lease (Tr. 24, 29; DOL. 3).

The Project Manual Outline for the Project included Addendum #1, which stated " New York State prevailing wage rates shall apply to the bidding on this project. The wage rate schedule shall be emailed (sic) to all bidders." (DOL Ex 4)

The contract resulted in the employment of workers classified by Prime and the Department as laborers. (DOL Ex. 3, Tr. pp. 47, 48)

The Public Authorities Control Board authorized financing of the Project through the New York State Housing Finance Authority by the issuance of bonds pursuant to its authority under section 51 of the Public Authorities Law. (DOL Ex 8)

[3] Judicial notice is taken of this publicly available database found at: https://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=671824&p_corpid=592989&p_entity_name=nyack%20housing%20assistance%20corporation&p_name_type=A&p_search_type=BEGINS&p_srch_results_page=0

On or about July 1, 2007, the Bureau issued Prevailing Wage Rate Schedule 2007 for Rockland County. ("2007 Schedule") The 2007 Schedule detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on the Project from July 1, 2007, to June 30, 2008, including the classification of Laborer- Building (Group G), with wages of $28.71 per hour and supplements of $14.30 per hour. (DOL. Ex. 9; Tr. 39, 40)

On or about July 1, 2008, the Bureau issued Prevailing Wage Rate Schedule 2008 for Rockland County. ("2008 Schedule") The 2008 Schedule detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on the Project from July 1, 2008, to June 30, 2009, including the classification of Laborer - Building (Group G), with wages of $30.21 per hour and supplements of$ l 4.30 per hour. (DOL Ex. 10; Tr. 40, 41)

On or about July 1, 2009, the Bureau issued Prevailing Wage Rate Schedule 2009 for Rockland County. ("2009 Schedule") The 2009 Schedule detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on the Project from July l, 2009, to June 30, 2010, including the classification of Laborer - Building (Group G), with wages of $31.21 per hour and supplements of $16.50 per hour/ (DOL Ex. 11; Tr. 41, 42)

On or about January 26, 2009 the Bureau requested Prime to furnish payroll records relating to the Project. (DOL Ex. 1; Tr. 20, 21)

During a field visit that took place in January of 2009, the Bureau informed Prime that the Project was a public work project and that workers were required to be paid prevailing wages and supplements (Tr. pp. 50, 51, 91, 92). Despite being informed so informed, Prime continued to pay workers less than the applicable prevailing wages and supplements. (Tr. 50, 51)

In response to the Department's records request, Prime provided some documentation, but was unable to submit any certified payroll records because Prime did not maintain them during the Project. (DOL. Ex. 12; Tr. pp. 42, 43)

After analyzing the records provided by Prime and using the hours and rates of pay shown, the Bureau determined that Prime employed six (6) workers on the Project in the Laborer

classification, and failed to pay or provide prevailing wages and/or supplements to the workers in accordance with the prevailing wage schedule in effect at the time. (DOL. Ex. 13, 14; Tr. 44, 45, 47, 48, 49)

During the period week ending February 8, 2008 through week ending February 5, 2010, Prime underpaid prevailing wages and supplements to laborers, workers and mechanics performing work on the Project in the amount of $180,388.51. (DOL Ex. 13, 14)

Larry Weinstein is a manager member of Prime. (DOL 3) Weinstein identified himself as an "officer" of Prime and is Prime's registered agent for service of process. (DOL 15; Tr. p. 80)

Prime was not informed that the Project was subject to the prevailing wage laws at the time he was asked to bid on it. (Tr. p. 80, 93) Prime was notified by the Department that the Project was subject to the prevailing wage law prior to the conclusion of the Project. (Tr. pp. 50, 51, 57) Prime had never performed a prevailing wage project prior to the Project. (Tr. p. 82)

The Project was considered large by the Bureau; the Bureau had no evidence of Prime's size; the Bureau had no record of prior violations by Prime; the Bureau considered the violations involved in this matter to be of moderate severity. (Tr. p. 59, 60)

The Bureau has no explanation for the length of time it took for this matter to arrive at a hearing, especially for the period from 2008 to 2012. (Tr. p. 61)

CONCLUSIONS OF LAW

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

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

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.*

Recently 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 Department, in its Proposed Findings of Fact and Conclusions of Law ("DOL Proposed Findings") argues that the Lease meets the definition of contract now set forth in the Labor Law. (DOL Proposed Findings p. 6)[5] The Lease was between the Department of Jurisdiction, a public agency, and NHAC, and clearly contemplated the construction of affordable, handicapped-accessible housing, which necessarily involved construction-like labor employing laborers, workers or mechanics. The construction of this housing also involved public funding authorized by the Public Authority Control Board. The Lease therefore meets the

[5] Labor Law section 220.3.c states in part: "The term "contract" as used in this article also shall include ...any public work performed under a lease, permit or other agreement pursuant to which the department of jurisdiction grants the responsibility of contracting for such public work to any third party proposing to perform such work to which the provisions of this article would apply had the department of jurisdiction contracted directly for its performance,..."

first and second prongs of the test.[6] Finally, the work product, affordable, handicapped-accessible housing that will be rented, not purchased, is clearly for the use or other benefit of the general public. Labor Law article 8 applies.

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]).

Using the contract, Lease, and Prime's records, the Department reasonably assigned the classification of Laborer to workers on the Project.

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

[6] The Department also argues that the failure of the Department of Jurisdiction to contract directly with Prime does not invalidate its argument, as liability may still be found via the Pyramid Amendment, which amended Labor Law section 220 to include "any contract for public work entered into by a third party acting in place of, on behalf of an for the benefit of such public entity pursuant to any lease, permit or other agreement..." Such argument, while viable in this case, need not be raised, as the Lease is sufficient by itself to meet the *De La Cruz* test.

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]).

In this case, the Department investigator used Prime's records for the hours of work and credited Prime for wages actually paid and used the applicable prevailing wage rate schedule to determine the appropriate amount of wages and supplements due. Such methodology is reasonable under these facts.

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]),[7] 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).

[7] The lapse of time, standing alone, does not constitute prejudice as a matter of law. *Matter of Louis Harris & Assoc. v. deLeon*, 84 NY2d 698, 702 (1994); *Matter of Corning Glass Works v. Ovsanik*, 84 NY2d 619, 623 (1994); *Cortland Nursing Home v. Axelrod*, 66 NY2d 169, 178-179 (1985).

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).

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, the Department has no explanation for the delay in proceeding with the investigation in this matter from 2008 into 2012. (Tr. p.61) accordingly, interest should be waived for the years 2008, 2009, 2010, 2011, and 2012.

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) [8] 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.

[8] "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.

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

Prime contends that he was unaware of the existence of many of the basic contract and supporting documents, yet signed the contract indicating an awareness of those same documents. Additionally, the Department initiated its investigation prior to the conclusion of the Project and notified Prime at that time of the prevailing wage law coverage. In light of these facts, Prime's failure to pay or provide prevailing wages and supplements was willful under the law.

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.

Prime was an LLC; Larry Weinstein was managing member of the LLC. As such, he was neither a shareholder nor a partner. However, he may be an "officer" of the LLC. Labor Law §220-b(3)(b)(1) states, in part, "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…" such entities shall be debarred from bidding on or being awarded public work projects for a period of five years from the date of the second willful determination. Insofar as the Commissioner must determine the issue of willfulness when a hearing is held, it is appropriate to determine, to the extent possible, the facts concerning the entities listed in §220-b(3)(b)(1).

The term "officer" as used in Labor Law should be read broadly and in its generic sense, as one who holds a position of authority of trust in any organization. The language of Labor Law §220-b(2)(g)(iii) does not reference a corporate officer but instead merely says "*any officer* of the contractor or subcontractor…" (emphasis added).

The term "limited liability company" is not found in Article 8. However, Article 8 of the Labor Law is the statutory implementation of a New York State Constitutional mandate for the payment of prevailing wages on public work projects, and Article 8 is remedial in nature. *Matter of Mid Hudson Pam Corporation et al. v Thomas F. Hartnett,* 156 A.D.2d 818, 821 (3d Dept. 1989) "The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee (citations omitted). *See also, Matter of Armco, supra.*.

Given its remedial nature, §220 should be construed liberally. *Austin v City of New York,* 258 N.Y. 113, 117. "[§220] is to be interpreted with the degree of liberality essential to the attainment of the end in view." (citations omitted). *See also, Bucci v Village of Port Chester,* 22 N.Y.2d 195, 201. "This court has more than once noted that *section 220* must be construed with the liberality needed to carry out its beneficent purposes." (citations omitted).

As set forth above, §220-b(3)(b)(1) concerns the parties to which a finding of willfulness may attach, including "the 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…" (emphasis added). The statute does not require that an officer must be an officer of a corporation. The dictionary definition of the term "officer" is: "one who holds an office of trust, authority, or command." *Merriam-Webster Online* (2016). As the managing member of Prime, Mr. Weinstein held the one and only position of trust, authority and command in Prime. Evidence that Mr. Weinstein signed contract documents shows that he controlled Prime and that his actions were knowing. Accordingly, Mr. Weinstein is personally subject to a finding of willfulness by the Commissioner.[9]

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. The Department requests a penalty of the maximum 25%. I find the imposition of such penalty unwarranted in light of the factors set forth in the Labor Law. Prime had no history of violations and had never before engaged in a public work project; the size of the Project was moderately large; Prime's cooperated to some degree with the investigation; and the violations involved were serious but not egregious. Given these factors I find that a penalty of 10% is appropriate.

[9] As for the issue of Mr.Weinstein's protection from liability by the Limited Liability Company Law, assuming for the moment that such protection exists in this case, the courts of New York have shown that the doctrine of piercing the corporate veil applies to limited liability companies as well as corporations. *Retropolis, Inc. v 14th Street Development LLC et al.,* 17 A.D.3d 209 (1st Dept. 2005); *Williams Oil Co. v Randy Luce E-Z Mart One*, 302 AD2d 736 (3d Dept. 2003). While there is a heavy burden attached to finding liability in these circumstances, the facts in this matter show that Mr. Weinstein had knowledge of the relevant facts and complete control or "domination" of Prime to the point that he alone was responsible and liable for its actions, and therefore may be found liable – in this case to have willfully violated Article 8. *TNS Holdings, Inc. v. MKI Securities Corp.*, 92 N.Y.2d 335 (1998); *Matter of Morris v New York State Dept. of Taxation & Finance*, 82 N.Y.2d 135 (1993). More to the point, Labor Law §220-b specifically provides for the liability of a corporate shareholders and officers under certain circumstances set forth above.

RECOMMENDATIONS

I RECOMMEND that the Commissioner of Labor adopt the within findings of fact and conclusions of law as the Commissioner's determination of the issues raised in this case, and based on those findings and conclusions, the Commissioner should:

DETERMINE that Prime underpaid wages and supplements due the identified employees in the amount of $180,388.51; and

DETERMINE that Prime is responsible for interest on the total underpayment at the rate of 16% per annum, however, interest is waived for the period from 2008 through 2012; 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 Larry Weinstein is an officer of Prime; and

DETERMINE that Larry Weinstein knowingly participated in the violation of Labor Law article 8; and

DETERMINE that Prime be assessed a civil penalty in the amount of 10% of the underpayment and interest due; and

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

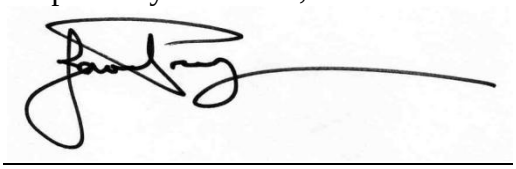
ORDER that, to the extent the Department of Jurisdiction and/or NHAC has withheld any funds, it remit payment of any such funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at The Maple Building, 3 Washington Ctr., 4th Floor, Newburgh, NY 12550

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: September 1, 2016
Albany, New York

Respectfully submitted,



Jerome Tracy, Hearing Officer