

STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

FERRANDINO & SON ENVIRONMENTAL, INC.  
Prime Contractor

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

**REPORT  
&  
RECOMMENDATION**

Prevailing Rate Case  
06-02606 Suffolk County

To: Honorable M. Patricia Smith  
Commissioner of Labor  
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on October 21, 2008, in Garden City, New York. The purpose of the hearing was to provide all parties an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor. Thereafter, the Department and the Respondent served Proposed Findings of Fact and Conclusions of Law, which were received on January 2 and January 6, 2009, respectively.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether Ferrandino & Son Environmental, Inc. ("Ferrandino") complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of a contract involving the replacement of an underground fuel tank at Taukomas (Brennan School) ("Project") for BOCES of Western Suffolk ("BOCES").

**APPEARANCES**

The Bureau was represented by Department Counsel, Maria Colavito (Richard Cucolo, Senior Attorney, of Counsel). Ferrandino appeared with its attorney, John J. Leo, Esq.

## **ISSUE**

Was the Respondent's failure to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?

## **FINDINGS OF FACT**

### **Procedural Background**

The hearing concerned an investigation made by the Bureau of a public work project performed by Ferradino. In advance of the hearing, on January 11, 2008, Ferradino entered into a written stipulation to settle the matter and pay the underpayment the Bureau had determined was due to Ferradino's workers on the Project (H.O. Ex. 1, attached Ex.2). That stipulation admitted that the underpayment was "willful" for the purposes of Labor Law §§ 220-b (3) (b) (*Id.*). Ferradino paid the \$10,893.61 required to be paid pursuant to the terms of the stipulation and a "So Ordered and Determined" copy of the stipulation was executed by the Commissioner and served upon Ferradino (H.O. 1). Thereafter, on or about March 27, 2008, Ferradino file a petition in the Appellate Division of the New York State Supreme Court challenging the willful determination (*Id.*). That matter before the Appellate Division was resolved by the parties agreeing to an administrative hearing on the limited issue of whether Ferradino's stipulated underpayment was willful (*Id.*). This report is addressed solely to that issue.

### **Factual Findings**

On or about May 31, 2007, Ferradino entered into a public work contract with BOCES to perform work in accordance with specifications for underground fuel tank replacement at Taukomas (Brennan School) (Dept Ex. 1). The specifications expressly notified Ferradino that it could not pay apprentice rates unless the involved individuals were registered in a New York State approved apprenticeship program and satisfied allowable ratios of apprentices to journeymen (T. 19-20; Dept Ex. 2). The underpayment determined due by the Bureau was largely attributable to Ferradino's payment of apprentice wages to unregistered apprentices (T. 21-22). In addition, Ferradino misclassified an operator and paid him plumber rates for operator work, failed to pay premium rates for overtime work, and did not have a dispensation to work overtime (T.

21, 35). During the course of the Bureau's investigation, the Bureau determined that Ferrandino had worked on at least two prior public work projects, and had received similar notification concerning the requirement of apprentice registration (T. 24-28; Dept. Exs. 9-11). The payrolls on the prior projects showed the same unregistered apprentices being paid as apprentices on the prior projects (T. 26). Ferradino is a party to a collective bargaining agreement (T. 30-31).

Ferrandino has not previously been found to have violated Article 8 of the Labor Law (T. 29-30, 40). Upon learning of the Bureau's investigation, Ferrandino was cooperative in the Bureau's investigation (T. 28, 30). Ferrandino promptly paid the underpayment and took corrective action to avoid future violations (T 40-43). During the course of the Project, Ferrandino's senior project manager was out on disability (T. 44).

## **CONCLUSIONS OF LAW**

### **Jurisdiction of Article 8**

Section 17 of Article 1 of the New York State Constitution mandates the payment of prevailing wages and supplements to workers employed on public work. This constitutional mandate is implemented through Labor Law Article 8. Labor Law §§ 220, *et seq.* "Labor Law § 220 was enacted to ensure that employees on public works projects are paid wages equivalent to the prevailing rate of similarly employed workers in the locality where the contract is to be performed and authorizes the [Commissioner of Labor] to ascertain said prevailing wage rate, as well as the prevailing 'supplements' paid in the locality." *Matter of Beltrone Constr. Co. v McGowan*, 260 A.D.2d 870, 871-872 (3d Dept. 1999). Labor Law §§ 220 (7) and (8), and 220-b (2) (c), authorize an investigation and hearing to determine whether prevailing wages or supplements were paid to workers on a public work project.

Since the County of Cayuga, a public entity, is a party to the instant public work contract, which has a public benefit, Article 8 of the Labor Law applies. Labor Law § 220 (2); and *see, Matter of Erie County Industrial Development Agency v Roberts*, 94 A.D.2d 532 (4th Dept. 1983), *affd* 63 N.Y.2d 810 (1984). The public work status of the project is not disputed.

## 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)<sup>1</sup> provides, among other things, that when two final determinations of a “willful” failure to pay the prevailing rate have been rendered against a contractor within any consecutive six-year period, such contractor shall be ineligible to submit a bid on or be awarded any public work contract for a period of five years from the second final determination.

For the purpose of Article 8 of the Labor Law, willfulness “does not imply a criminal intent to defraud, but rather requires that [the contractor] acted knowingly, intentionally or deliberately” – it requires something more than an accidental or inadvertent underpayment. *Matter of Cam-Ful Industries, Inc. v Roberts*, 128 A.D.2d 1006, 1006-1007 (3d Dept. 1987). “Moreover, violations are considered willful if the contractor is experienced and ‘should have known’ that the conduct engaged in is illegal

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<sup>1</sup> “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 willfully 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.

(citations omitted).” *Matter of Fast Trak Structures, Inc. v Hartnett*, 181 A.D.2d 1013, 1013 (4th Dept. 1992). *See also, Matter of Otis Eastern Services, Inc. v Hudacs*, 185 A.D.2d 483, 485 (3d Dept. 1992). The violator’s knowledge may be actual or, where he should have known of the violation, implied. *Matter of Roze Assocs. v Department of Labor*, 143 A.D.2d 510; *Matter of Cam-Ful Industries, supra*. An inadvertent violation may be insufficient to support a finding of willfulness; the mere presence of an underpayment does not establish willfulness. *Matter of Scharf Plumbing & Heating, Inc. v Hartnett*, 175 A.D.2d 421. A contractor’s cooperation in an investigation does not preclude a finding of willfulness. *Id.*

The fact that Ferrandino failed to pay the required prevailing rates is not disputed. Ferrandino maintains, however, that proof that it had previously performed a couple of other public work projects does not establish that it was an experienced public work contractor who, on the basis of its experience, should have known how to properly comply with the requirements of Article 8. It further notes that during the course of the project, Ferrandino’s senior project manager was out on disability. It asserts that its failure to comply was unintentional and inadvertent.

Ferrandino, as the prime contractor on this Project, had received the project specifications that expressly notified it that only individuals registered in a New York State approved apprenticeship training program were eligible to receive apprentice rates. This same notification had been provided in the prior public work contacts to which Ferrandino had been a party. On the basis of these contractual notifications alone, Ferrandino knew or should have known of the requirement that only New York State-registered apprentices were eligible to receive apprentice rates. Nevertheless, apprentice rates were paid to individuals who were not registered and who worked regularly on the Project. This situation is not analogous to the facts in *Matter of Scharf Plumbing & Heating*. There, a single individual, not regularly assigned to public work projects or to the project under investigation, was sporadically sent to the subject project and improperly paid apprentice rates. *Matter of Scharf Plumbing & Heating, Inc. v Hartnett*, 175 A.D.2d at 421-422. The contractor involved was not aware of the sporadic assignment and never saw the involved employee on site. The Appellate Division found significant that every other employee on the project was properly paid, which

demonstrated to the Court that no improper motive for the underpayment existed. *Id.* In this case, the employees were regularly assigned to the Project (and had apparently been similarly assigned on prior public work projects). Ferrandino was therefore aware of their presence on the Project and certainly should have been aware of their unregistered status. Moreover, additional wage violations, including work misclassifications and overtime pay violations, were found. It strains credulity that a contractor that is a party to a collective bargaining agreement, and who performed prior public works projects, was unaware of State apprentice eligibility and overtime pay requirements. Contrary to Ferrandino's contention, substantial evidence does exist to support the Bureau's conclusion that the underpayments were willful within the meaning of Labor Law § 220-b (3) (b). Ferrandino's conceded cooperation does not preclude this finding. *Id.* at 421

### **RECOMMENDATIONS**

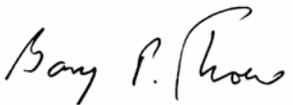
I RECOMMEND that the Commissioner of Labor adopt the within findings of fact and conclusions of law as the Commissioner's determination of the issues raised in this case, and based on those findings and conclusions, the Commissioner should:

DETERMINE that the failure of Ferrandino to pay the prevailing wage or supplement rate was a "willful" violation of Article 8 of the Labor Law.

ORDER that the Bureau pay the appropriate amount due for each employee on the Project, and that any balance of the total amount due shall be forwarded for deposit to the New York State Treasury.

Dated: February 9, 2009  
Albany, New York

Respectfully submitted,



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Gary P. Troue, Hearing Officer