

IN THE MATTER OF

GR. GRATES CONSTRUCTION CORPORATION
and
GREGG G. GRATES and JEFFREY A. NANNA,
as officers and shareholders of
GR. GRATES CONSTRUCTION CORPORATION
and its successor or substantially owned-affiliated entities
GRATES BUILDING ENTERPRISES INC.
and
GRG CONSTRUCTION SERVICES LLC.
Prime Contractor

**REPORT
&
RECOMMENDATION**

Prevailing Rate Case
00-03228 Oneida County

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.

To: Honorable Colleen C. Gardner
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing dated May 12, 2008, a hearing was held on August 7, 2008, October 27, 2008, and October 28, 2008, in Utica, 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.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether GR Grates Construction Corporation ("GR Grates"), Gregg G. Grates, Jeffrey A. Nanna, Grates Building Enterprises Inc., and GRG Construction Services LLC, the Prime Contractor, complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of a contract involving the construction of additions and alterations to several schools ("Project") for the Holland Patent Central School District ("Department of Jurisdiction").

APPEARANCES

The Bureau was represented by Department Counsel, Maria Colavito (Marshall H. Day, Senior Attorney, of Counsel).

All corporate entities named in the caption appeared by and through either Gregg G. Grates or Jeffrey A. Nanna.

Gregg G. Grates appeared on his own behalf, pro se.

Jeffrey A. Nanna appeared on his own behalf, pro se, on August 7, 2008, and, thereafter, by and through David P. Antonucci, Esq.

HEARING OFFICER

John W. Scott was designated as Hearing Officer and conducted the hearing in this matter.

ISSUES

1. Did GR Grates 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 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. Are Grates Building Enterprises Inc. and/or GRG Construction Services LLC and/or Grates, Merchant, Nanna, Inc. “substantially owned-affiliated entities” of GR Grates?
5. Are Grates Building Enterprises Inc. and/or GRG Construction Services LLC and/or Grates, Merchant, Nanna, Inc.¹ “successors” of GR Grates?

¹Grates, Merchant, Nanna, Inc. was not named as a party to this proceeding. However, the uncontroverted evidence in the record indicates that, at all times relevant to the Project, Gregg G. Grates and Jeffrey A. Nanna had ownership interests or were otherwise affiliated with Grates, Merchant, Nanna, Inc. (T. 24, 38). Gregg G. Grates and Jeffrey A. Nanna were both personally served with the Notice of Hearing that included

6. Is Gregg G. Grates one of the five largest shareholders of GR Grates?
7. Is Jeffrey A. Nanna one of the five largest shareholders of GR Grates?
8. Is Gregg G. Grates an officer of GR Grates who knowingly participated in a willful violation of Article 8 of the Labor Law?
9. Is Jeffrey A. Nanna an officer of GR Grates who knowingly participated in a willful violation of Article 8 of the Labor Law?
10. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

The hearing concerned an investigation made by the Bureau of the Project, which involved a contract with the Holland Patent Central School District to furnish materials, labor, tools, and equipment necessary for the addition and alteration of several schools located in the Holland Patent Central School District, Oneida County, New York. (Dept. Ex. 13; T. 25-26; 75-79; 269-271). The Project was assigned Prevailing Wage Rate Case No. 00-03228 for Oneida County.

Facts of General Applicability

There is no dispute that GR Grates is a corporation organized and existing in the State of New York (Dept. Ex. 30), and that, at the time the work was performed on the Project, Gregg G. Grates was the President of GR Grates and a 50% shareholder (T.24, 25), and Jeffrey A. Nanna was the Vice -President and Secretary of GR Grates and a 50%

notice of statutory liability under Article 8 for substantially owned-affiliated entities and successor corporations (Hearing Officer Ex.2). Gregg G. Grates and Jeffrey A. Nanna fully participated in the hearing. There was no objection placed on the record to the receipt of any evidence that tended to establish that Grates, Merchant, Nanna, Inc. is a substantially owned-affiliated entity or a successor corporation of GR Grates. I find that the Respondents had sufficient notice of the Department's intention to seek liability for Grates, Merchant, Nanna, Inc. as a substantially owned-affiliated entity or a successor corporation of GR Grates.

shareholder (T.25, 67, 68). Jeffrey A. Nanna was the Project Manager who was responsible for the Project (T. 29, 69, 70, 91). Stuart Finer, the attorney for GR Grates, was designated as the Funds Control Officer on the Project (T. 31, 366, 367, 408). Mr. Finer's responsibilities as the Funds Control Officer included, among other duties, receiving funds from the Department of Jurisdiction and disbursing them for necessary expenses related to the Project, including employee payroll (T. 413-414).

The Bureau Investigation

During the period of October 2002 through January 2003 the Bureau received complaints from eight employees of GR Grates alleging that they worked in various classifications on the Project during the period of week ending April 15, 2001 through week ending December 8, 2002 and that they were not paid the legally required wages and supplemental benefits/contributions to union funds (Dept. Exs. 1-8, 19; T. 252-265). Based upon these complaints, the Bureau commenced an investigation. The Bureau forwarded PW-18 forms, Record Request Notices, dated October 7, 2002, November 15, 2002, December 13, 2002, and January 24, 2003 to GR Grates and the Department of Jurisdiction ordering the production of, among other items, a contractor profile, certified payrolls, cancelled payroll checks, proof of payment of fringe benefits, and copies of monthly union contribution reports (Dept. Exs. 9, 10, 11, and 12; T. 265-269). The Department did not receive a response from GR Grates to these multiple record requests (T. 269). However, the Bureau received the following documents from the Department of Jurisdiction: the contract between the Department of Jurisdiction and GR Grates for the Project (Dept. Ex. 13; T. 269-271); the Project Manual for the Project together with the 2000 Prevailing Wage Rate Schedule (Dept. 14; T. 271-274); and GR Grates' Certified Payroll Records for the weeks ending December 30, 2001 through September 29, 2002 (Dept. Ex. 17; T. 275-277). Additionally, the Bureau obtained the applicable Prevailing Wage Rate Schedules for 2001 (Dept. Ext 15) and 2002 (Dept. Ex. 16). Finally, the Bureau received a log of hours worked on the Project (Dept. Ex. 33) that was prepared and kept by Steve Nanna, the brother of Respondent Jeffrey Nanna, who was employed by GR Grates to work on the Project as a Superintendent and who also worked on the

Project as a journeyman carpenter (T. 125, 126, 194, 288). This log was faxed to the Bureau by Steve Nanna, and it provided the Bureau with the hours worked on the Project by GR Grates' employees that were not included in the Certified Payroll Records (T. 286, 288, 289).

CLASSIFICATION

The Bureau of Public Work Wage Investigator, Benjamin Little, testified regarding his investigation of the Project and the classification of GR Grates' employees. The Bureau relied upon the information contained in the complaints (Dept. Exs. 1-8), GR Grates' certified payroll records (Dept. Ex. 17), and interviews with the employees and the Project Superintendants (T. 279-280) to determine that GR Grates employed eleven employees who worked on the Project from week-ending April 15, 2001 through week-ending December 8, 2002 as carpenters, laborers, painters, and masons. The classification of the employees has not been disputed by GR Grates either in the context of the hearing or in the post-hearing submissions.

In its determination of the employees' hours worked and wages paid, the Bureau relied upon the certified payroll records received from the Department of Jurisdiction (Dept. Ex. 17); the employee claim forms (Dept. Exs. 1-8); the log of hours worked on the Project prepared by Steve Nanna (Dept. Ex. 33); and interviews with employees and Superintendants (T. 279-280, 291). The prevailing wage rates were determined from the applicable Prevailing Wage Rate Schedules (T. 291; Dept. Exs. 15 and 16). The Investigator utilized the above referenced documents and information to determine the hours worked and the wages paid, compared these figures to the prevailing wage rates, and gave GR Grates credit for actual payments in determining underpayments. (T. 293). With respect to Larry Cristallo and Steve Nanna, the record indicates that these individuals, who were considered Superintendants by GR Grates, were both paid a salary of \$850.00 per week. (See, Dept. Exs. 7, 18; T. 133, 190, 194, 198) However, these employees testified that they worked with tools on the Project as journeymen carpenters in addition to performing supervisory work (T. 125, 126, 192, 195, 237, 238). The Investigator utilized the same methodology and evidence identified above as having been

utilized with respect to the other employees, to determine the hours worked by Cristallo and Steve Nanna, their classification as carpenters for the hours they worked with tools on the Project, and their underpayment. GR Grates was also given credit for the full salaries paid to Cristallo and Steve Nanna (Dept. 18; T. 294-296; 297-298).

The Bureau issued Notices to the Department of Jurisdiction to Withhold/Release Payment dated October 4, 2002 and October 18, 2002, indicating that the Bureau estimated an underpayment of wages and supplements on the Project in the amount of \$18,054.21. This estimate was based upon employee claims and related documents (Dept. Exs. 23, 25). Additionally, in a Notice of Labor Law Inspection Findings dated January 23, 2003, the Bureau notified the Department of Jurisdiction and GR Grates that Investigator Little had determined that GR Grates had violated Labor Law § 220.3 with respect to the payment of wages and supplements on the Project and he estimated the underpayment of wage supplements to ten employees in the amount of \$26,640.34 (Dept. Ex. 22). Finally, Investigator Little testified that GR Grates underpaid its eleven employees a total amount of \$33,982.11 in wages and supplemental benefits for the period of April 15, 2001 through December 18, 2002 (Dept. Exs. 18, 19; T. 301, 302).

The determination of the hours worked, the wages paid, and the methodology employed by the Bureau was not disputed by GR Grates at the hearing or in the post-hearing submissions. The gravamen of the argument advanced by GR Grates and Gregg G. Grates is that the payroll was paid by a Funds Control Officer designated by the bonding company with the consent of the Department of Jurisdiction and that, since Gregg G. Grates had no control over the payment of wages, he should not be held personally or financially responsible for any underpayments. Jeffrey A. Nanna acknowledged that GR Grates underpaid the employees (T. 18, 19, 84, 85), but argues that he is also not responsible for the underpayments because he did not prepare the payrolls or control the proceeds of the Project or payroll account (T. 96, 97; Antonucci Law Firm April 6, 2009 Post Hearing Submission and Conclusions of Law at para. 2)

FALSIFICATION OF PAYROLL RECORDS

GR Grates' certified payroll records (Dept. Ex. 17) indicate the employees were paid at certain rates of wages for the job classifications assigned to each employee (Dept. Exs. 18, 19). However, these payroll records indicate that supplemental benefits were not paid to or provided for workers on the project although the hourly rate listed for the workers were in excess of the hourly rates in effect at the time. For example, the certified payroll records submitted to the Department of Jurisdiction by GR Grates for one of its employees, Kevin Coleman, indicate he was paid an hourly rate consisting of wages of \$21.94 without receiving a supplemental benefit in addition to his wage, even though the hourly rate in effect at the time for a Laborer consisted of wages of \$17.00 per hour, and a supplemental benefit rate of \$6.29 per hour (See, Dept. Exs. 17, 18). Additionally, Investigator Little testified that the hours included in the claim forms and pay stubs (Dept. Ex. 1-8) do not match the overtime hours listed in the certified payroll records (T. 263-265, 289-297; Dept. Exs. 12, 13, 17, and 18). The claim forms indicate that the employees worked overtime hours on weekends, the employees' pay stubs reflect payment for these overtime hours at a straight time rate, and the certified payroll records do not include most of overtime hours claimed by the employees (T. 284, 285). In the aggregate, these facts indicate an inaccurate reporting of hours in the certified payroll records. Finally, as set forth above, Site Superintendants Cristallo and Steve Nanna were not included in the certified payroll records even though both of these employees worked as carpenters throughout the Project (T. 123, 124, 195, 237, 238). The Bureau concluded that GR Grates failed to accurately report the payment of prevailing wages to its employees in the certified payrolls, underpaid its employees, and falsified the certified payroll records with respect to the reporting of the wages and benefits paid to employees and the listing of employees who actually worked on the Project.

Prior History

Jeffrey A. Nanna and Gregg G. Grates, the officers and principal shareholders of GR Grates, testified that GR Grates was an experienced public work contractor (T.36, 70), and that they were aware of the requirement to pay its employees prevailing wage

rates and supplemental benefits on public work projects. These witnesses further testified that they were aware that the employees who were working on the Project were required to be paid wages and supplemental benefits consistent with the applicable prevailing rate schedule, which was attached to the bid specifications (T. 79).

Substantially Owned-Affiliated and Successor Entities

At all times relevant to the Project, Gregg G. Grates and Jeffrey A. Nanna had ownership interests or were otherwise affiliated with two corporations, to wit: GR Grates and Grates, Merchant, Nanna, Inc. (T. 24, 38). The record reflects that Gregg G. Grates and Jeffrey A. Nanna were 50% owners of GR Grates (T. 24, 94, 95). GR Grates was involved with general construction services for municipalities, school districts and residential projects (T. 25), while Grates, Merchant, Nanna, Inc. was a construction management company (T. 38).

At the time the Project was awarded to GR Grates, Gregg G. Grates and Jeffrey A. Nanna had two projects left to complete in connection with their mutual business interests. One was the within Project involving the Holland Patent School District, and the other was a project involving construction at the Oneida County Courthouse (T. 73). It was agreed that Jeffrey A. Nanna would work on the Holland Patent School District project through GR Grates and Gregg G. Grates would work on the Oneida County Courthouse project through Grates, Merchant, Nanna, Inc. (T. 73). Although Jeffrey A. Nanna was the Project Manager for the Project, the record reflects that time records for the employees who worked on the Project were compiled by the Site Superintendants (T. 91, 201, 203, 204), and faxed to Gregg G. Grates at the Oneida County Courthouse (T. 92, 204, 212). Gregg G. Grates would then send the employees' hours to ADP, the payroll service that prepared the payroll records and payroll checks for GR Grates on the Project (T. 31, 32, 413). ADP would send these payroll records and payroll checks to Stuart Finer, the Funds Control Officer for GR Grates, who would then fund the payroll account and distribute the payroll checks (T. 413, 414, 417). There is no evidence

indicating that Finer had any authority to create the payroll records or to otherwise review or audit these records for accuracy (T. 424, 425, 429, 430).

The record reflects that Gregg G. Grates was Vice-President of Grates Building Enterprises, Inc., a company that was created in or about 1999 that was wholly owned by Gregg G. Grates' wife, Vita Grates (T. 39, 40). Grates Building Enterprises, Inc. performed construction management services for commercial, residential, and public works projects (T. 40, 41).

The record further reflects that Gregg G. Grates was involved as a managing member of GRG Construction Services, LLC. This company was formed in 2005 to provide construction management services (T. 20, 21).

Jeffrey A. Nanna testified that Gregg G. Grates used a GR Grates truck to work on a Grates Building Enterprises, Inc. project (T. 73-74). However, Jeffrey A. Nanna, Gregg G. Grates and Larry Cristallo all testified that none of the companies in which Gregg Grates had an interest shared employees, tools, vehicles, offices or phone numbers (See, T. 42, 82, 213, 214, 215).

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 Department of Jurisdiction, a public entity, is a party to the instant public work contract, 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).

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 App. Div. 236, 241 (1st Dept. 1954). Classification of workers is within the expertise of the Department. *Matter of Lantry v State of New York*, 6 N.Y.3d 49, 55 (2005); *Matter of Nash v New York State Dept of Labor*, 34 A.D.3d 905, 906 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 803 (2007); *Matter of CNP Mechanical, Inc. v Angello*, 31 A.D.3d 925, 927 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 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 A.D.3d 905, 906, *quoting Matter of General Electric, Co. v New York State Department of Labor*, 154 A.D.2d 117, 120 (3d Dept. 1990), *affd* 76 N.Y.2d 946 (1990), *quoting Matter of Kelly v Beame*, 15 N.Y. 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 A.D.2d 665 (3d Dept. 1992), *lv denied*, 80 N.Y.2d 752 (1992).

Pursuant to the contract, GR Grates was to supply labor and material in connection with site work, concrete, steel, brick, masonry, carpentry, flooring, painting, ceiling, drywall, interior finishes, toilet partitions, doors and windows. (Dept. Ex. 13; T. 26, 35, 76, 83, 196, 197, 202, 252, 258) The Bureau classified GR Grates’ workers as carpenters, laborers, painters and masons. (Dept. Ex. 18) Investigator Little testified that these classifications were based on the employees’ complaint forms, or interviews with the employees or the Superintendants on the project. (T. 279, 280) These classifications

have not been disputed by the Respondents either during the hearing or in their post hearing submissions. The record contains sufficient evidence to support the Bureau's classifications of GR Grates' workers.

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 A.D.2d 818, 821 (3d Dept. 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 A.D.2d 82 (1st Dept. 1999); *Matter of Alphonse Hotel Corp. v Sweeney*, 251 A.D.2d 169, 169-170 (1st Dept. 1998).

Investigator Little testified that he determined the hours worked by the employees and the wages they received from the employee complaints and/or payroll records. He then compared these figures to the prevailing wage rates in effect to determine whether there was an underpayment in wages or supplements. (T. 292, 293) In light of the inconsistencies between the certified payroll records and the employees' payroll records and complaints, the Bureau's method of arriving at the underpayment determination is reasonable and supported by the sufficient credible evidence in the record . The Bureau's calculation that GR Grates underpaid its employees in the total amount of \$33,982.11, in wages and supplements, should be sustained. The Department produced evidence indicating that the Department of Jurisdiction is withholding the sum of \$26,178.60 as a result of Notices to Withhold Payment forms that were served on it by the Bureau. (Dept. Exs. 23, 24, 25, 26, 27; T. 305, 306, 307)

Gregg G. Grates and Jeffrey A. Nanna both argue that they should not be found liable for any underpayments of wages or supplements because the wages were paid by Attorney Stuart Finer, the designated Funds Control Agent. Additionally, Gregg G. Grates argues that, since Jeffrey A. Nanna was the Project Manager on the Project, he lacked control over the preparation and review of the payroll process. Conversely, Jeffrey A. Nanna argues that he had no control over the accuracy of the payroll records, since these records were faxed to Gregg G. Grates for his review and subsequent forwarding to the payroll company, ADP. Thereafter, ADP would send the payroll checks to the Funds Control Agent, Stuart Finer, for funding and distribution. In essence, both Gregg G. Grates and Jeffrey A. Nanna argue that the liability for any underpayments should be borne by Stuart Finer, the Funds Control Agent.

The record reflects that Stuart Finer was designated as the Funds Control Agent at the inception of the Project, since the bonding company was not willing to provide bonding to GR Grates due to financial shortfalls in prior projects (T. 408, 409). Finer was not an owner or shareholder of GR Grates (T. 432). It is not in significant dispute that the role of the Funds Control Agent was to receive the report and checks from the payroll company and then deposit sufficient funds in the GR Grates payroll account to fund the payroll checks. After the payroll was funded, the Funds Control Agent would tender the payroll checks for distribution to the employees (T. 417). Finer testified that he did not sign the payroll checks. The checks were signed by either Gregg G. Grates or Jeffrey A. Nanna (T. 417).

Stuart Finer testified that he did not review the payroll records for accuracy (T. 424, 425, 429, 430). Finer testified that Jeffrey A. Nanna would prepare the payroll records and then he would fax them to Gregg G. Grates. Gregg G. Grates would then transmit these payroll records to ADP (T. 413).

The record contains sufficient credible evidence to support a finding that Gregg G. Grates and Jeffrey A. Nanna were officers and shareholders of GR Grates who both had control over the preparation and review of the payroll records. Jeffrey A. Nanna was the Project Manager who was responsible for the Project. He collected the total hours the GR Grates' employees worked, created the payroll records, and sent these records to

Gregg G. Grates (T. 429). Gregg G. Grates would then receive these time records and transmit them to ADP for the creation of certified payroll records and payroll checks (T. 413).

Finally, the record does not contain sufficient credible evidence to support a finding that Stuart Finer has any liability or culpability for the underpayment. Attorney Finer was designated the Funds Control Officer for GR Grates to facilitate the bonding for the Project. Finer did not produce any financial records for GR Grates or review these documents that were generated by Jeffrey A. Nanna, the Site Supervisors, or ADP. Finer was not an officer or shareholder of GR Grates. Gregg G. Grates and Jeffrey A. Nanna have offered insufficient evidence to support their argument that they should be insulated from liability for the underpayments by the activities of Stuart Finer.

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 A.D.3d 925, 927 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 802 (2007). Consequently, GR Grates 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 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. This five-year debarment also applies to the contractor, subcontractor, successor, or any

substantially-owned affiliated entity of the contractor or subcontractor, any partner, any officer of the contractor or subcontractor who knowingly participated in the violation, and any shareholders who own or control at least ten percentum of the outstanding stock of the contractor or subcontractor or any successor for the period after November 1, 2002, or the five largest shareholders of the contractor or subcontractor or any successor for the period prior to November 1, 2002.

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 (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 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 A.D.2d 421.

The Department urges that, as an experienced public work contractor, GR Grates should have known that its workers who were classified as carpenters, laborers, painters, and masons, should have been paid the prevailing wage rate that corresponds with these classifications. The record makes it clear that GR Grates, and its two principal officers and shareholders were experienced public work contractors (T. 36, 70). I find that GR Grates’ extensive public work experience should have put it on notice that this Project that involved construction and renovation of public schools was a public work project requiring the payment of prevailing wage rates in the appropriate amounts that

correspond to the employees' classifications. I find that the record supports a finding that GR Grates underpayment of wages constitutes a willful violation of Labor Law § 220.

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 Department has offered documentary evidence and the testimony of Investigator Little indicating that the hours included in the claim forms and pay stubs (Dept. Ex. 1-8) do not match the overtime hours listed in the certified payroll records. (T. 263-265, 289-297; Dept. Exs. 12, 13, 17, and 18) Additionally, Site Superintendants Cristallo and Steven Nanna were not included in the certified payroll records even though the record supports a finding that, in addition to their supervisory responsibilities, these employees worked as carpenters throughout the Project. The Bureau concluded that GR Grates failed to accurately report the payment of prevailing wages to its employees in the certified payrolls, underpaid its employees, and falsified the certified payroll records. The Respondents have failed to offer any reasonable evidence or testimony to contradict the Bureaus' conclusion. I find that the record contains sufficient credible evidence to support a finding of falsification of payroll records.

Substantially Owned-Affiliated Entities

In pertinent part, Labor Law § 220 (5) (g) defines a substantially owned-affiliated entity as one where some indicia of a controlling ownership relationship exists or as "...an entity which exhibits any other indicia of control over the ...subcontractor..., regardless of whether or not the controlling party or parties have any identifiable or documented ownership interest. Such indicia shall include, power or responsibility over employment decisions,... power or responsibility over contracts of the entity, responsibility for maintenance or submission of certified payroll records, and influence over the business decisions of the relevant entity." Additionally, Labor Law § 220 (5) (k) defines a

successor as “an entity engaged in work substantially similar to that of the predecessor, where there is substantial continuity of operation with that of the predecessor.”

The Department alleges that Grates Building Enterprises, Inc., Grates, Merchant, Nanna, Inc. and GRG Construction Services, LLC. are substantially owned-affiliated entities or successor entities of GR Grates that should be debarred as a result of the failure to provide accurate certified payrolls on the Project. The record indicates that Gregg G. Grates and/or Jeffrey A. Nanna did have a beneficial interest in the companies named in this case. However, the record does not contain sufficient credible evidence of any control or continuity of operations between these companies to support a finding of successor entities. Specifically, the credible evidence indicates that, as relates to GR Grates and the other named corporate entities, there were no shared employees, tools, vehicles, offices or phone numbers (T. 42, 82, 213, 214, 215). I find that Grates Building Enterprises, Inc., Grates, Merchant, Nanna, Inc., and GRG Construction Services, LLC. are not successor entities of GR Grates. The record contains insufficient evidence to support a finding of any continuity of operation between Grates Building Enterprises, Inc., Grates, Merchant, Nanna, Inc., and GRG Construction Services, LLC. and GR Grates.

I further find that the record does not support a finding that Grates Building Enterprises, Inc. and GRG Construction Services, LLC. are substantially owned-affiliated entities of GR Grates. The record does not contain any evidence that Grates Building Enterprises, Inc. or GRG Construction Services, LLC. had any responsibility or authority over issues relating to GR Grates, such as employment decisions, power or responsibility over contracts, responsibility for maintenance or submission of certified payroll records, and influence over the business decisions of the relevant entity.

Finally, I find that Grates, Merchant, Nanna, Inc. is a substantially owned-affiliated entity of GR Grates. Gregg G. Grates and Jeffrey A. Nanna were both owners of these two corporations at all times relevant to the issues raised herein (T. 24, 25, 38). Additionally, these corporate entities engaged in construction related activities for clients that were shared by Gregg G. Grates and Jeffrey A. Nanna (T. 73). Finally, Gregg G. Grates engaged in business related activities on behalf of both GR Grates and Grates,

Merchant, Nanna, Inc. that specifically included receiving time records and participating in the creation of payroll records and payroll checks for the employees of GR Grates on the Project (T. 31, 32, 413). I find that the foregoing constitutes sufficient indicia of a common ownership relationship as defined in Labor Law § 220 (5) (g) to support a finding that GR Grates and Grates, Merchant, Nanna, Inc. were substantially owned-affiliated entities.

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 five largest shareholders of the contractor, or any officer of the contractor who knowingly participated in the willful violation of Article 8 of the Labor Law shall likewise be ineligible to bid on, or be awarded public work contracts for the same time period as the corporate entity.

It is not in dispute that, at all relevant times, Gregg G. Grates and Jeffrey A. Nanna were both officers of GR Grates and the largest shareholders who owned more than ten percentum of the outstanding stock of GR Grates (Dept. Ex. 28; T. 25, 67, 68). It is also not in dispute that both Gregg G. Grates and Jeffrey A. Nanna had extensive public work experience that should have put them on notice that this Project was a public work project requiring the payment of the corresponding prevailing wage rates to the GR Grates employees (T. 36, 70, 79). Based upon the foregoing, I find that that the record supports a finding that Gregg G. Grates and Jeffrey A. Nanna knowingly participated in the willful violation of Article 8 of the Labor Law and 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.

The Department has produced no evidence indicating whether GR Grates had any prior violations. However, the record does support findings that GR Grates and its principal officers had extensive experience with public work contracts that put them on notice that the Project required paying its workers the prevailing wage rates and supplemental benefits that correspond to the workers' job classifications. Specifically, the record indicates that GR Grates completed public work projects at Utica College, Chittenango Schools, Edmonston Schools, the Morrisville ice rink, and the Sylvan Beach Schools (T. 69). The record indicates that GR Grates was a large employer, since the within Project required GR Grates to maintain sufficient work force and bonding ability for a \$4,451,500 school construction and renovation project (Dept. Ex. 13). The record further supports findings that GR Grates and its principal officers and owners willfully violated the provisions of Labor Law Article 8 by failing to pay the workers prevailing wage rates and supplemental benefits and in falsifying payroll documents. Finally, GR Grates failed to cooperate with the Department in its investigation by providing the documents requested by the Bureau (T. 269). I find that the record contains sufficient credible evidence to support the imposition of a civil penalty in the Department's requested amount of twenty-five percent (25%) of the total amount due (underpayment and interest).

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 GR Grates underpaid wages and supplements due the identified employees in the amount of \$33,982.11; and

DETERMINE that 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 GR Grates to pay the prevailing wage or supplement rate was a “willful” violation of Article 8 of the Labor Law; and

DETERMINE that the willful violation of GR Grates involved the falsification of payroll records under Article 8 of the Labor Law; and

DETERMINE that Grates, Merchant, Nanna, Inc. was a “substantially owned-affiliated entity” of GR Grates; and

DETERMINE that Gregg G. Grates is an officer of GR Grates; and

DETERMINE that Jeffrey A. Nanna is an officer of GR Grates; and

DETERMINE that Gregg G. Grates was one of the five largest shareholders of GR Grates during the period prior to November 1, 2002, and an owner of ten percentum of the outstanding stock of GR Grates during the period subsequent to November 1, 2002; and

DETERMINE that Jeffrey A. Nanna was one of the five largest shareholders of GR Grates during the period prior to November 1, 2002, and an owner of ten percentum of the outstanding stock of GR Grates during the period subsequent to November 1, 2002; and

DETERMINE that Gregg G. Grates knowingly participated in the Violation of Article 8 of the Labor Law; and

DETERMINE that Jeffrey A. Nanna knowingly participated in the Violation of Article 8 of the Labor Law; and

DETERMINE that GR Grates be assessed a civil penalty in the Department’s requested amount of 25% of the underpayment and interest due; and

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

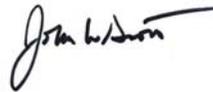
ORDER that the Department of Jurisdiction remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at SOB 207 Genesee Street Room 603B, Utica, NY 13501); and

ORDER that if any withheld amount is insufficient to satisfy the total amount due, GR Grates, 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: June 11, 2010
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John W. Scott", with a long horizontal flourish extending to the right.

John W. Scott, Hearing Officer