

STATE OF NEW YORK: DEPARTMENT OF LABOR

In the Matter of

JAMES L. RHEIN;

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
Town of Wallkill in Middletown, New York.

DEFAULT
REPORT &
RECOMMENDATION

Prevailing Wage Rate
PRC No. 2015010219
Case ID: PW01 2016006278
Orange County

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

Pursuant to a Notice of Hearing issued on January 16, 2018, a hearing was held on February 23, 2018 in Albany, 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 James L. Rhein (“Respondent”) complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in

the performance of a public work contract involving sidewalk and curb installation (“Project”) for the Town of Wallkill (“Department of Jurisdiction”).

APPEARANCES

The Bureau was represented by Department Counsel Pico Ben-Amotz, Dawa Jung-Acosta, of Counsel.

There was no appearance made by, or on behalf of Respondent.

FINDINGS AND CONCLUSIONS

On January 19, 2018, the Department duly served a copy of the Notice of Hearing on Respondent via regular and certified mail, return receipt requested, on the last known addresses of Respondent. The certified mailings were returned as unclaimed (Hearing Officer Ex. 4). The regular mail envelope was not returned to the Department. The Notice of Hearing scheduled a February 23, 2018, hearing and required the Respondent to serve an Answer at least 14 days in advance of the scheduled hearing.

Respondent failed to file an Answer to the charges contained in the Notice of Hearing or to appear at the hearing. As a consequence, Respondent is in default in this proceeding.

The Notice of Hearing alleges that Respondent underpaid wages and supplements to its workers.

At the hearing, the Department produced substantial and credible evidence, including the sworn testimony of the Bureau investigator and documents describing the underpayments, which supported the Bureau’s charges that:

The Project was subject to Labor Law article 8.

Respondent entered into a contract for the Project with the Department of Jurisdiction.

Respondent provided certified payrolls to the Department of Jurisdiction; the certified payrolls showed the days and hours worked by the workers on the Project; Respondent classified all workers on the Project as laborers.

The Department relied upon the days and hours worked and the names of the workers as shown on the certified payrolls to calculate underpayments based upon misclassification of the workers.

Respondent willfully underpaid \$10,251.01 to its workers for the audit period week ending August 29, 2014 through the week ending September 26, 2014¹.

Respondent James L Rhein is an unincorporated business owned by James L. Rhein, who knowingly participated in the violation of Labor Law article 8.

No monies were withheld on the Project.

Respondent had no prior history of violations, was uncooperative with the investigation, and violated the Labor Law by failing to properly classify its workers and pay them the prevailing rate of wages and supplements required by law. The Department presented no evidence with regard to the size of Respondent's business.

For the foregoing reasons, the findings of the Bureau should be sustained.

RECOMMENDATIONS

Based upon the default of the Respondent in answering or contesting the charges contained in the Department's Notice of Hearing, and upon the sworn and credible testimonial and documentary evidence adduced at the hearing in support of those charges, and based upon the record as a whole, I recommend that the Commissioner of Labor make the following determinations and orders in connection with the issues raised in this case:

DETERMINE that Respondent underpaid its workers \$10,251.01 on the Project; and

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

DETERMINE that the willful violation of Respondent did *not* involve the falsification of payroll records under Labor Law article 8²; and

¹ The Department takes the position, as set forth by its witness, a public work wage investigator, that because Respondent failed to provide any evidence of wage payments beyond the certified payrolls received by the Department, Respondent did not pay *any* wages to workers on the Project.

² The Department requested a finding that Respondent falsified its payrolls. The Department relied upon Respondent's payrolls to obtain the names of workers, and the days and hours worked on the Project. The only violation the Department found was a misclassification on Respondent's payrolls of all of the workers as laborers rather than the multiple classification required by the nature of the work performed on the Project. Labor Law § 220-b (3) (b) (1) 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, 2011, <http://www.merriam-webster.com/dictionary/falsify>). In the absence of a statutory definition, the meaning ascribed by lexicographers is a useful guide. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 537-538; *Quotron Systems v. Gallman*, 39 NY2d 428, 431 (1976). Here, the Department found the payrolls accurate with regard to the names of workers and their days and hours of work. The inaccuracy with regard to classification, without any testimony or evidence as to Respondent's intent, does not by itself rise to the level of falsification such that Respondent should be debarred.

DETERMINE that James L. Rhein was the owner of Respondent contractor James L. Rhein who knowingly participated in the violation of Labor Law article 8; and

DETERMINE that Respondent 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 Respondent be assessed a civil penalty in the amount of 15% of the underpayment and interest due³; and

ORDER that the Bureau compute the total amount due (underpayment of \$10,251.01, interest at 16% from date of underpayment and 15% civil penalty); and

ORDER that upon the Bureau's notification, Respondent shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at: State Office Building Campus, Bldg. 12, Room 130, Albany, NY 12240; and

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

Dated: March 9, 2018, 2018
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jerome Tracy", with a long horizontal line extending to the right.

Jerome Tracy, Hearing Officer

³ While the Department requested a penalty of 25%, it presented no evidence with regard to one of the four statutory factors used to determine penalty; of the remaining three, it presented evidence relevant to only two.