Office of the Comptroller v. Mackey Reed Electric, Inc.

OATH Index No. 1950/13 (Jan. 3, 2014), *adopted*, Comptroller's Dec. (June 24, 2014), **appended**

Petitioner proved that respondents failed to pay prevailing wages and supplemental benefits to employees on three public works contracts. Respondents are liable for the underpayment plus interest. Based on the willful nature of the underpayment and deliberate falsification of payroll records and kickback scheme, 25% civil penalty and five-year debarment also recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
OFFICE OF THE COMPTROLLER
Petitioner
- against -
MACKEY REED ELECTRIC, INC., & DAWN AVILA (a/k/a DAWN BECHTOLD)
Respondents

REPORT AND RECOMMENDATION

ASTRID B. GLOADE, *Administrative Law Judge*

Petitioner, the Office of the Comptroller (the "Comptroller"), brought this proceeding pursuant to section 220(8) of the Labor Law and title 44, chapter 2, of the Rules of the City of New York ("RCNY"). Petitioner alleges that respondents, Mackey Reed Electric, Inc. and Dawn Avila (also known as and herein referred to as "Dawn Bechtold"), Mackey Reed's president, failed to pay the prevailing rate of wages and supplements to two employees who performed electrical work at the Fort Washington Armory ("Armory") and the Brooklyn Academy of Music ("BAM") in 2005 and 2006, pursuant to three public works contracts with the New York City Department of Design and Construction ("DDC") and the New York City Department of Cultural Affairs ("DCA") (ALJ Ex. 1). Petitioner contends that respondents knowingly and willfully underpaid workers, falsified payroll records, and required the kickback of supplemental

benefits. The Comptroller seeks monetary relief for the employees, interest, a civil penalty of 25%, and respondents' debarment (ALJ Ex. 1).

A hearing was held over two days. Petitioner relied on the testimony of the Comptroller's investigator and a complaining employee, as well as documentary evidence. Respondents relied on the testimony of Dawn Bechtold and on documentary evidence.

For the reasons below, the petition should be granted and respondents found liable for failing to pay the prevailing rate of wages and supplemental benefits to two employees on public works projects. Because the underpayment was willful and respondents deliberately falsified payroll records and engaged in a kickback scheme, I also recommend imposition of 16% interest, a 25% civil penalty, and respondents' debarment for five years.

PRELIMINARY MATTERS

Five days before the first day of the hearing in this matter, respondents requested an adjournment to permit respondents to file a motion for summary judgment on the issue of whether the contracts in issue were for public works as is required by the Labor Law. This request came two days after I had denied respondents' request for adjournment of the trial date to prepare for the hearing.[1] I denied respondents' adjournment request.

OATH Rules section 1-34 provides that pre-trial motions are to be "addressed to the administrative law judge as promptly as possible, and sufficiently in advance of the hearing to permit a timely decision to be made. Delay in presenting such a motion may, in the discretion of the administrative law judge, weigh against the granting of the motion. . . . " 48 RCNY § 1-34(a) (Lexis 2013). Here, there was significant delay in making the motion: the case had been scheduled for hearing in May 2013, yet respondents did not seek to move for summary judgment until three months later, and only a few days before the start of the hearing. Moreover, pre-trial dispositive motions are generally disfavored in OATH practice. *See Dep't of Correction v.*

[1] Respondents' request for adjournment of the hearing date was denied in a conference call with counsel. Respondents' counsel explained that he needed time to meet with his client to prepare for the hearing and that he and his client had both recently changed offices. Petitioner objected to the request, noting that the hearing had been scheduled three months earlier and discovery had been timely exchanged. OATH rule 1-32 provides that adjournments are addressed to the discretion of the ALJ "and shall be granted only for good cause." 48 RCNY §1-32(b) (Lexis 2013). I determined that respondents failed to present good cause for the requested adjournment since there had been a three-month period during which trial preparation could have been undertaken. Moreover, the hearing was scheduled for one week after the date of the request, giving counsel ample time to meet with respondents.

LaSonde, OATH Index No. 2526/11, mem. dec. at 2 (July 8, 2011) ("Pre-trial motions to dismiss are disfavored in practice at OATH and have only been granted in the clearest cases of failure by petitioner to state a viable claim"); 48 RCNY § 1-50 (Lexis 2013) ("In cases referred to OATH for disposition by report and recommendation to the head of the agency, motions addressed to the sufficiency of the petition or the sufficiency of the petitioner's evidence shall be reserved until closing statements"). Although I denied their request for an adjournment to move for summary judgment, respondents raised the issue in their post-hearing brief and I have addressed it below.

At the close of its case, petitioner moved to amend the petition to seek recovery of $28,500 to conform to evidence at trial that employee Ancil Watson kicked back that amount to Ms. Bechtold on the BAM projects. Specifically, petitioner argued that its amended petition "did not include a dollar amount for underpayment of wages that accounted for the kickback benefits" (Tr. 167-68). Petitioner contended that if this tribunal concludes that Mr. Watson kicked back supplemental benefit payments to the respondents, the amount of money kicked back, $28,500, should be awarded as unpaid benefits. Respondents objected to amending the petition, arguing that the motion should not be decided until there was a determination that respondents engaged in a kickback scheme (Tr. 168, 170). I reserved decision on that motion, which I now grant. *See* 48 RCNY § 1-25 (Lexis 2013) (amendment to pleadings less than twenty-five days before the start of the hearing "may be made only on consent of the parties or by leave of the administrative law judge on motion").

Motions to amend the complaint to conform to the proof may be granted absent prejudice to the respondent. *See Dep't of Sanitation v. Davis,* OATH Index No. 1523/02 at 5-6 n.2 (July 2, 2002) ("the general rule is that pleadings 'may be amended to conform to the proof at any time, provided that no prejudice is shown'") (citing *Miles v. City of New York*, 251 A.D.2d 667, 667 (2d Dep't 1998)); *Dep't of Correction v. Bovell*, OATH Index No. 1910/99 at 2 n.1 (Aug. 13, 1999) (petitioner's motion made at the close of the hearing to conform the charges to the proof was granted because the events underlying the new charge were fully litigated at the hearing; respondent had the opportunity to cross-examine petitioner's witness and was previously on notice of critical aspects of the new charges).

In this case, respondents are not prejudiced by the amendment. Petitioner alleged, in its pleadings, that respondents had engaged in a kickback scheme relating to their failure to pay prevailing wages and supplements (ALJ Ex. 1). Respondents were therefore on notice that petitioner sought to impose liability on respondents for requiring kickbacks. Moreover, respondents had the opportunity to cross-examine petitioner's witnesses regarding the amount allegedly kicked back to respondents and to present evidence in their case in chief to rebut the allegations. Respondents' sole objection to amending the pleading was that it would have been premature to grant petitioner's motion to amend because there was a factual dispute about whether there was any kickback (Tr. 168).

Therefore, petitioner's motion to amend the petition to seek recovery of the amount it alleges Mr. Watson returned to respondents as a kickback of supplemental benefits on the BAM project is granted.

ANALYSIS

Section 220 of the Labor Law provides that "[t]he wages to be paid for a legal day's work . . . to laborers, workmen or mechanics upon such public works, shall be not less than the prevailing rate of wages" and "[t]he supplements . . . to be provided to laborers, workmen or mechanics upon such public works, shall be in accordance with the prevailing practices in the locality." Labor Law § 220(3)(a), (b) (Lexis 2013). Supplements are defined as "all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not 'wages' within the meaning of the law, including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay, life insurance, and apprenticeship training." Labor Law § 220(5)(b).

Labor Law section 220 implements the mandate of the New York State Constitution that contractors on public works pay their workers, laborers, and mechanics no less than the rate of wages and supplements that is prevailing for the applicable trade or occupation in the locality where the project is located. N.Y. Const. art. I, § 17. As "fiscal officer" for the City of New York, the Comptroller sets the prevailing wages and supplements and investigates complaints by workers. Labor Law § 220(5)(e), (7) (Lexis 2013). Petitioner alleges that respondents violated section 220 of the Labor Law by failing to pay prevailing wages and supplements to two

electricians who worked on public works projects at BAM and the Armory and by engaging in a kickback of supplemental benefits (ALJ Ex. 1).

Respondents' Motion to Dismiss

Respondents sought dismissal of the petition on the grounds that neither the BAM nor the Armory project is a public work on which payment of prevailing wages is required. Respondents argue that the BAM and Armory projects are not public works because the primary objective of the projects was to benefit two not-for-profit corporations and not the general public (Resp. Br. at 2).

Some factual background about the projects is necessary to determine whether the contracts are for public works. These facts are not disputed.

The Armory Project

The Armory is a structure owned by New York City (Pet. Ex. 8). It is home to the National Track and Field Hall of Fame and is "the busiest indoor track and field center in the United States" (Resp. Exs. A, B). The Armory "serves over 125,000 youngsters, welcomes over 450,000 visitors, and hosts over 120 track and field competitions each year" (Resp. Exs. A, B). The Armory Foundation is a not-for-profit corporation that is responsible for oversight of the Armory (Resp. Exs. A, B). The Armory Foundation maintains the track and field hall of fame and provides academic services to New York City students at the Armory (Resp. Exs. A, B, D, H).

In May 2005, the City, through DDC, contracted with the Armory Foundation for capital improvements to the Armory (Pet. Ex. 8). Those improvements included installation of heating, ventilation, and air conditioning ("HVAC") systems, installation of a new track surface, and construction of a museum store. The contract specifies that "the City has determined that the public interest would be best served by funding" those capital improvements and that the City appropriated $4,429,000 towards the project. The contract provided that the Armory Foundation would enter into contracts for and supervise construction of the project (Pet. Ex. 8). Included in the contract are provisions for the payment of prevailing wages to laborers, workers, or mechanics who perform the work contemplated by the contract (Pet. Ex. 8 at 39-40).

In March 2006, respondents and the Armory Foundation entered into two contracts pursuant to which respondents were to perform electrical work at the Armory relating to the City's contract with the Armory, including work on an air conditioning system and an electrical service upgrade (Pet. Ex. 9; Resp. Exs. A, B). The contracts provided that respondents were to be paid a total sum of $249,800 (Pet. Ex. 9).

The BAM Projects

The City owns buildings located at 30 Lafayette Avenue and 651 Fulton Street (Pet. Exs. 19-21, 23-24). In 1973, the City leased the premises located at 30 Lafayette Avenue to the St. Felix Street Corporation, which changed its name to The Brooklyn Academy of Music, Inc. ("BAM, Inc.") in 1975 (Pet. Ex. 23; Resp. Ex. G). Pursuant to the lease, the annual rent payable to the City is one dollar and the duration of the lease is 99 years (Pet. Ex. 23). The lease requires BAM, Inc. to use the premises to "promote development of any and all of the visual and performing arts and to encourage and cultivate public and professional knowledge and appreciation of all such arts" through various artistic, cultural, and educational programs. It further requires that BAM, Inc. "endeavor to maintain prices for tickets to the events and activities it conducts on the . . . premises at levels which will encourage attendance by a broad segment of the population of the City of New York." The City is responsible for certain repairs to the building, including those to its mechanical, electrical, heating, and air conditioning systems (Pet. Ex. 23). In 1989, the City leased the premises located at 651 Fulton Street to BAM, Inc., on terms similar to those in the 1973 lease (Pet. Ex. 24).

In October 2003, acting through DDC and DCA, the City entered into a construction contract with BAM, Inc. pursuant to which the City agreed to pay $1,960,000 for renovation of offices and restoration of the façade of the building located at 30 Lafayette Avenue (Pet. Ex. 6). The contract provided for installation of exterior lighting to the façade of the building, a new glass canopy, and exterior signs. The contract required the payment of prevailing wages to laborers, workers, and mechanics who work on the project (Pet. Ex. 6 at 39-40).

In November 2005, again acting through DDC and DCA, the City entered into a construction contract with BAM, Inc. for work on what the contracting parties referred to as the 2005 Infrastructure Project (Pet. Ex. 3). The contract described the work as replacing the HVAC system, restoring the ceiling, upgrading the orchestra pit, and replacing the fire curtain and floor

in the Peter J. Sharp Opera House, which is located at 30 Lafayette Avenue, and installing a theatre fly system, upgrading the electricity, and replacing the floor and the HVAC system in the Harvey Theatre, which is located at 651 Fulton Street (Pet. Ex. 3). The City agreed to provide up to $11,197,000 for the renovation work (Pet. Ex. 3). The 2005 contract, like the 2003 agreement, provided for the payment of prevailing wages (Pet. Ex. 3 at 40).

In November 2005, respondents and BAM, Inc., entered into two contracts for work that arose out of the contracts between BAM, Inc. and the City: one contract was for an electrical upgrade of the Opera House and the other was for an electrical upgrade of the Harvey Theatre. The contracts provided that respondents were to be paid $203,890 for their work on the Opera House project and $384,820 for their work on the Harvey Theatre project (Resp. Exs. E, F).

Respondents contend that neither the BAM nor the Armory projects are public works projects on which the payment of prevailing wages is required.

The New York Court of Appeals recently adopted a three-prong test for determining whether a particular project is subject to the prevailing wage law. *De La Cruz v. Caddell Dry Dock & Repair Co.*, 21 N.Y.3d 530 (2013). In *De La Cruz*, the Court modified the test it had adopted in *Matter of Erie County Industrial Development Agency v. Roberts*, 94 A.D.2d 532 (4th Dep't 1983), *aff'd*, 63 N.Y.2d 810 (1984), to provide guidance as to what constitutes a public work for purposes of Labor Law section 220 and the New York Constitution.[2] Thus, for a project to constitute a public work:

> 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.

De La Cruz, 21 N.Y.3d at 538. The Court of Appeals noted that "this test will have to be applied on a case-by-case basis in order for its contours to be fully explored." *Id.*

The parties do not dispute that the projects at issue satisfy the first two prongs of the *De La Cruz* test (Resp. Br. at 14; Pet. Br. at 24). The first prong is satisfied because New York City,

[2] In *Matter of Erie County*, the court articulated a two-pronged test for determining whether a project was subject to the prevailing wage law. Under that standard, for the prevailing wage law to apply, "(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." *Matter of Erie County*, 94 A.D.2d at 537. The *De La Cruz* decision leaves intact the first prong of the test and amplifies the second prong.

through its agencies DCA and/or DDC, contracted with BAM, Inc., and the Armory Foundation for work on premises owned by the City. Those entities then subcontracted with respondents to perform electrical work on the projects and respondents hired the electricians to perform the work. The second prong is satisfied because the contracts at issue involve employment of workers, laborers, and mechanics and require construction or construction-like labor (Pet. Exs. 3, 6, 8). In addition, the City funded the projects. Specifically, under the terms of the contracts, the City provided $4,429,000 for the Armory renovations, $11,197,000 for renovations to the Opera House and the Harvey Theatre on the BAM contract, and $1,960,000 for work on the BAM façade (Pet. Exs. 3, 6, 8).

Thus, the only prong of the *De La Cruz* test that is in dispute is whether the "primary objective or function of the work product" is "the use or other benefit of the general public." Respondents argue that the primary objective of their work was not to benefit the general public, but to benefit two private not-for-profit corporations (Resp. Br. at 13). Specifically, respondents contend that the nature and purpose of their work product on the projects were to enhance the not-for-profit corporations' "nongovernmental functions" and to "support the Armory and BAM's missions" rather than to maintain the buildings' facilities and structures (Resp. Br. at 13, 18).

The issue of whether renovations on a publicly-owned building leased to a private entity is a public works project was addressed in *Sarkisian Brothers, Inc. v. Hartnett*, 172 A.D.2d 895 (3d Dep't 1991). In that case, a building located on the campus of the State University of New York ("SUNY") at Oswego and owned by the New York State Office of General Services was leased to a for-profit entity for development as a hotel and convention center. In awarding the rights to develop the property, the State considered "revenue to the State, restoration of the landmark site, compatibility with the community and the campus, and the accommodations provided to the community." The lease agreement contained language regarding requirements for the use of the building and provided that all renovations, exterior alterations, and design drawings were subject to approval by the State and SUNY to determine if the needs of the public were met. In addition, the lease guaranteed that the public would have access to the facility at least one day per month and 75% of the rooms were to be reserved for use by SUNY or its affiliates. *Id.* at 895. The court determined that those provisions of the lease "tend to

demonstrate the public use, public ownership, public access and public enjoyment characteristics of the project" and support a finding that renovation to the building was a public work project subject to the prevailing wage law. *Id.*

Factors similar to those discussed in *Sarkisian Brothers, Inc.* have been considered by this tribunal in determining whether a project was a public work. Thus, in *Comptroller v. CDI 21st LIC, LLC*, OATH Index No. 1125/05, mem. dec. (Sept. 14, 2005), *adopted*, Comptroller's Dec. (July 17, 2006), ALJ Lewis determined that a project to renovate a privately-owned building that had been leased by the City's School Construction Authority ("SCA"), a public benefit corporation, for use as a public high school was a public work project subject to the prevailing wage requirement. In reaching this conclusion, ALJ Lewis determined that the "primary objective of the project was to benefit the public by constructing a public high school . . . ." *Id.* at 6. Factors ALJ Lewis considered include the extent of public use and access to the building by students and staff, the terms of the lease, which demonstrated that the City's Board of Education and the SCA exercised "overarching control over the property and the construction process, as if they were the landowner itself," and the fundamental public purpose of the project, which was to fulfill the mandate of free public education reflected in the New York State Constitution. *Id.* at 5-6.

In this case, the work was performed on buildings that are owned by the City. The City retains ownership of those buildings while leasing them to not-for-profit corporations for use in artistic, cultural, educational, and recreational undertakings. It is undisputed that public access and enjoyment of the BAM buildings was contemplated in the City's leasing arrangements with the private not-for profit corporation: the leases require that BAM "encourage and cultivate public and professional knowledge and appreciation" of the arts and that tickets to events at BAM be priced to facilitate public attendance and enjoyment. Moreover, the BAM properties were leased subject to certain reporting requirements that evince the City's continued oversight of the not-for-profit entity's use of the premises; for example, BAM, Inc. is required to annually provide the City with reports, plans, and projections regarding its programs and operations and is required to obtain City approval for major alterations to the premises (Pet. Exs. 23, 24). Thus, the renovations and upgrades to the BAM buildings were intended to maintain and improve publicly-owned buildings over which the City has retained some authority.

Similarly, the Armory is a City-owned building in which several hundred thousand members of the public enjoy and participate in educational and recreational events annually. While the City's lease with the Armory Foundation is not part of the record, the facts in the record concerning the nature and extent of the public access and use of the City-owned property are persuasive evidence that renovations to the building's electrical and air conditioning systems were primarily for the use and benefit of the public as users and owners of the premises.[3]

Respondents contend that the primary objective of their work product was not the use or other benefit of the general public. Specifically, they argue that the work they performed at the Armory and BAM was for the benefit of the not-for-profit entities that operate the properties and only incidentally benefitted the public (Resp. Br. at 17-18, 21). Respondents rely on *Matter of American Water Resources, LLC v. Liu*, 2013 N.Y. Misc. LEXIS 4457 (Sup. Ct. N.Y. Co. Sept. 26, 2013), in which the court rejected the Comptroller's contention that a contract to offer private homeowners an affordable plan to cover repairs on privately-owned sewer service lines was to benefit the public. Their reliance is misplaced. In *Matter of American Water Resources, LLC*, noting that "[t]he contract is not to repair or work on public structures, even though the repair work may involve the City's water system when it connects to privately owned sewer service lines," the court concluded that the contract's clear purpose was to benefit private homeowners, and any benefit to the public was merely incidental. *Id.* at *22-23. In this case, the Armory and BAM contracts are for work on publicly-owned buildings that are used by many members of the public. Therefore, the facts of this case are distinguishable from those in *Matter of American Water Resources, LLC*, where the contract was to repair privately-owned property and its primary objective was to benefit private homeowners.

Respondents further contend that although the BAM and Armory buildings are owned by the City, "the work at issue was not to maintain the building facilities and structures," but to

[3] Respondents maintained that the Comptroller's investigator initially assigned to this case took the position that the Armory was not subject to the prevailing wage law (Tr. 231-32). Respondents submitted no evidence in support of this claim. Had petitioner's investigator concluded, however, that the Amory was not a prevailing wage project, the investigator's determination is not binding on this tribunal. *See, e.g., Dep't of Correction v. Ford,* OATH Index Nos. 734/13, 735/13, 736/13, 737/13, & 738/13 at 11 (May 23, 2013) (determination by facility investigators that correction officer assigned to the facility used appropriate force, which conclusion was not adopted by the department's investigative division, not binding on this tribunal, which determined officer used excessive force). Moreover, the weight of the credible evidence supports a finding that the Armory contract was a prevailing wage project.

support the not-for-profit corporations' missions (Resp. Br. at 13). Respondents point to the nature of their work product, which included lighting the façade of a building, improving an orchestra lift and electronic curtains, and upgrading electricity for sound and air conditioning systems, to suggest that the purpose of the work was to enhance the not-for-profit entities' ability to fulfill their recreational, cultural, and artistic missions (Resp. Br. at 18–20). Respondents' argument is without merit. The benefit of the renovations run directly to the City, which owns the buildings on which the work was performed. The purpose or function of the work product at issue was not, as respondents contend, merely to enhance the missions of the not-for-profit entities that use the buildings: the work product served to improve publicly-owned buildings and enhanced the conditions under which the not-for-profit entities offer programs and events for public use and enjoyment.

In sum, I find that the primary function or objective of the work on the BAM and Armory projects is for the use or other benefit of the general public. Therefore, the projects at issue are public works for which payment of prevailing wages was required. Respondents' motion to dismiss the petition is denied.

Failure to Pay Prevailing Rate of Wages and Supplemental Benefits

Petitioner alleges that respondents violated section 220 of the Labor Law by knowingly and willfully failing to pay the prevailing wages and supplemental benefits to Messrs. Ancil Watson and Barrington Mighty on the BAM and Armory projects, by falsifying payroll records, and by requiring that Mr. Watson kick back money they paid him as supplemental benefits (ALJ Ex. 1). To establish a claim under that provision, petitioner must prove the charges by a preponderance of the credible evidence. *See Comptroller v. Uddin USA Corp.*, OATH Index No. 741/07 at 2 (Mar. 19, 2007). Petitioner has met its burden in this case.

In December 2005, Messrs. Watson and Mighty began to work at BAM pursuant to contracts between respondents and BAM (Pet. Ex. 5). In March 2006, Messrs. Mighty and Watson started to perform electrical work at the Armory pursuant to respondents' contract with the Armory Foundation (Pet. Ex. 22). In April 2007, Messrs. Mighty and Watson filed verified complaints with the Comptroller alleging that they were not paid prevailing wages and benefits on the Armory and BAM projects (Pet. Exs. 1, 2). The parties stipulated that to the extent that

the BAM and Armory projects were public works within the meaning of Labor Law section 220, Messrs. Mighty and Watson should be classified as "Electrician A" (Tr. 14). The prevailing wage rate for an Electrician A was $43 per hour until May 11, 2006, when it increased to $44 per hour (Pet. Ex. 15). The prevailing supplemental benefit rate for the same classification was $33.93 per hour until May 11, 2006, when it increased to $35.51 per hour (Pet. Ex. 15).

The Complaints

In his complaint, Mr. Mighty stated that he worked as a senior electrician on the BAM and Armory projects from November 2005 to December 2006. Mr. Mighty described his duties and indicated that he worked eight-hour days on the projects. According to Mr. Mighty's complaint, he was paid $43 per hour until December 7, 2006, when his rate of pay changed to $29 per hour. Mr. Mighty indicated that he was the supervisor/foreperson and that he reported to his employer the hours worked by everyone on the job. Mr. Mighty noted that he received holiday pay, but no other fringe benefits or cash payments in lieu of benefits (Pet. Ex 1). Annexed to Mr. Mighty's complaint were copies of earnings statements which show that between December 15, 2005 and November 29, 2006, he was paid at an hourly rate of $43 (Pet. Ex. 1). Also annexed to the complaint are two undated payroll statements that reflect amounts described as "benefits," in the amounts of $9,000 and $6,934.73. Finally, in a statement signed under penalty of perjury, dated December 11, 2009, Mr. Mighty stated that when he received a benefit check from Mackey Reed, Ms. Bechtold told him to return half of the amount to help the company grow (Pet. Ex. 1).

Mr. Watson made similar allegations in his verified complaint. According to Mr. Watson's complaint, he worked as a junior electrician on the BAM and Armory projects from November 2005 until December 2006. Mr. Watson described his duties, which were almost identical to those summarized in Mr. Mighty's complaint (Pet. Exs. 1, 2).[4] Mr. Watson indicated that he was paid between $18 and $20 per hour. According to Mr. Watson's complaint, Mr. Mighty was his supervisor and was responsible for notifying the respondents of the hours Mr. Watson worked. Mr. Watson indicated in his complaint that he never received cash payments instead of benefits, nor had he received any fringe benefits, except holiday pay (Pet. Ex. 2).

[4] Indeed, the complaints are quite similar because, as Mr. Watson testified, Mr. Mighty completed the complaint form on Mr. Watson's behalf (Tr. 102). Mr. Watson testified that Mr. Mighty filled out both complaint forms because he took notes and could explain what happened better than Mr. Watson (Tr. 135-36). Mr. Watson also testified that he and Mr. Mighty are friends (Tr. 135, 156).

Annexed to Mr. Watson's complaint were copies of paystubs or earning statements for the period November 2005 to December 2006, which indicate that Mr. Watson's rate of pay was $18 per hour until August 2006, when the rate increased to $20 per hour. Some of the statements reflected overtime pay at a rate of $27 per hour. Also annexed to the complaint are three undated employee statements that reflect amounts described as "benefits," two for $9,000 and one for $8,000. In a statement signed under penalty of perjury, dated November 12, 2009, also attached to the complaint, Mr. Watson stated that when he received a benefit check from Mackey Reed, Ms. Bechtold asked him to give back a portion of each check. Mr. Watson maintained that he returned $6,000 out of a $9,000 check, $3,000 out of a $5,000 check, and returned a $5,000 check uncashed (Pet. Ex. 2).

The Comptroller's Investigation

Upon receiving the complaints, petitioner initiated an investigation and notified respondents to produce records and appear for a meeting with its investigator. Investigator Annabelle Walters testified that she was assigned to the investigation, which was initially handled by a different investigator (Tr. 23-24, 75). In September 2007, the Comptroller sent respondents a notice to produce documents relating to the BAM and Armory projects (Tr. 28-29, 91; Resp. Ex. Z). Petitioner's request sought production of documents, including certified payroll reports, sign-in sheets, and payroll registers for the BAM and Armory projects (Resp. Ex. Z). Respondents appeared for a meeting with the Comptroller and produced what Investigator Walters described as limited documentation regarding the allegations (Tr. 29, 79). By letter dated November 24, 2009, Investigator Walters requested cancelled checks for the Comptroller's investigation of the BAM project (Pet. Ex. 12). Ms. Bechtold provided documents in response to that request in January 2010 (Pet. Ex. 12). According to Investigator Walters, the Comptroller did not receive certified payroll documents regarding the Armory projects until a week before the hearing commenced (Tr. 29, 93).

In conducting the BAM audit, the Comptroller's audit department reviewed respondents' certified payroll records (Tr. 56; Pet. Ex. 16). Investigator Walters testified that the auditors did not review respondents' internal payroll register because respondents did not supply those documents to the Comptroller until after the audit had been completed (Tr. 58).

The audit covered the complainants' work on the BAM contracts from December 2005 through October 2006 (Pet. Ex. 16). The audit showed that respondents paid Mr. Mighty the prevailing wage rate for regular and overtime hours, except on one occasion involving seven hours when he was paid the prevailing regular hourly rate instead of the prevailing overtime hourly rate. The audit showed, however, that respondents failed to pay Mr. Mighty the full amount due to him as prevailing supplemental benefits. Petitioner's audit determined that respondents failed to pay Mr. Mighty $11,386.26 in prevailing wages and benefits on the BAM projects (Pet. Ex. 16).

The Comptroller's audit also showed underpayment of prevailing wages to Mr. Watson, whom respondents paid at a rate of $18 per hour, when the prevailing wage rate was $43 per hour. The amount of underpayment, $26,146, was offset by an overpayment of prevailing supplemental benefits to Mr. Watson of $4,212.51. Thus, petitioner's audit determined that respondents failed to pay Mr. Watson $21,933.49 (Pet. Ex. 16).

Investigator Walters testified, however, that petitioner's audit determination was mistaken in that it did not take into account the monies that Mr. Watson allegedly kicked back to the respondents (Tr. 61-62). Specifically, petitioner alleges that Mr. Watson received benefits checks totaling $39,687.59, but was required to return $28,500 of that amount to Ms. Bechtold as a kickback of the benefits he received (Tr. 167-71). Investigator Walters testified that in calculating the total benefits paid by respondents, the Comptroller's audit department used the checks issued by respondents to Mr. Watson and divided them over the period of the audit (Tr. 61-62; Pet. Ex. 16). However, according to Investigator Walters, Mr. Watson did not receive the value of those checks because he returned portions of the benefits checks issued by the respondents and the audit department failed to deduct the amounts that were allegedly returned to the respondents. Therefore, petitioner sought leave to amend its petition to allege that respondents failed to pay Mr. Watson $28,500 in benefits, which was not reflected in the BAM audits, which application was granted in this decision.[5]

In August 2012, petitioner and BAM, Inc. entered into a stipulation of settlement whereby BAM, Inc. acknowledged that pursuant to Labor Law section 223 it was vicariously

[5] Petitioner does not seek to recover amounts allegedly kicked back by Mr. Mighty, who did not testify at the hearing (Pet. Br. at 13).

liable for any underpayment by respondents and agreed to pay $46,135.05, representing the underpayment of wages and supplements, 6% interest, and a 10% civil penalty (Pet. Ex. 18).

With respect to the Armory project, the Comptroller's audit encompassed work between March and October 2006 (Pet. Ex. 17). The data used in the Armory audit came from a summary of certified payroll records prepared by respondents, and their payroll register (Pet. Ex. 17; Tr. 66). According to Investigator Walters, respondents had not provided the actual certified payroll records, despite her requests, until shortly before the hearing; therefore, the auditor relied on the summary prepared by respondents, which proved to be consistent with the certified payroll records that respondents eventually produced (Tr. 30, 66-67; Pet. Exs. 10, 22). The audit shows that respondents paid Mr. Mighty the prevailing wage rate for regular and overtime hours, except for minor instances that amounted to a $36.25 underpayment. Respondents paid Mr. Watson $18 per hour for the regular hours he worked at the Armory, which increased to $20 per hour in October 2006 (Pet. Ex. 11; Tr. 109). The audit indicates that respondents failed to pay supplemental benefits to Messrs. Mighty and Watson for their work on the Armory (Pet. Ex. 17; Tr. 67). Petitioner also obtained respondents' internal payroll register, which does not reflect payment of weekly supplemental benefits (Pet. Ex. 11). In sum, petitioner's audit showed that respondents underpaid Messrs. Mighty and Watson wages and benefits totaling $5,744.63 and $10,752.90, respectively (Pet. Ex. 17).

Complainant Watson's Testimony

Mr. Watson worked for the respondents from late 2005 to early 2007, during which time he worked on the BAM and Armory projects (Tr. 103-04, 107, 122; Pet. Exs. 5, 11, 22; Resp. Ex. N). His work entailed building electrical rooms, running conduits, pulling wires, and installing transformers, electrical cabinets, motorized curtains, fiber optics, and wires for LED lighting (Tr. 105-07).

Mr. Watson testified that Mr. Mighty told him that the BAM project was a prevailing wage job around March 2006, when he received his first benefit check (Tr. 120-22). According to Mr. Watson, Mr. Mighty told him when he received the benefits checks he would have to arrange with Ms. Bechtold to give her back money to help the company (Tr. 121). Mr. Watson testified that Mr. Mighty told him the money he returned to Ms. Bechtold would be used to help

the company acquire a new truck and build the company, so that the employees could get health insurance (Tr. 113, 117, 149).

According to Mr. Watson, he deposited five benefits checks he received from respondents into his bank account between April and October 2006 (Tr. 110-16; Pet. Exs. 12, 14). Mr. Watson maintained that for each benefit check he received, he returned a portion of it to Ms. Bechtold in cash while they were at the jobsite (Tr. 113-14). Mr. Watson said that Ms. Bechtold told him how much money he was to give her back out of the benefits checks he received (Tr. 113-14, 149). Mr. Watson testified that his bank records reflect his deposit of the benefits checks he received from respondents, along with his paycheck, and his withdrawal of monies that he paid to Ms. Bechtold in cash (Tr. 113-17; Pet. Ex. 14). Mr. Watson's testimony, together with his bank records, paystubs, and respondents' cancelled checks, establish that his deposits of monies designated as benefits payments were followed a few weeks later by withdrawal of sums that petitioner maintains represent amounts Mr. Watson kicked back to Ms. Bechtold. These transactions are summarized in the following chart:

Date of Deposit	**Amount of Deposit**	**Amount Designated as Benefits**	**Amount Withdrawn from Bank Account**	**Date Withdrawn from Account**
4/14/06	$8,554.11	$8,000.00	$4,500	5/22/06
5/31/06	$8,913.75	$8,000.00	$6,000	6/12/06
6/19/06	$6,394.55	$5,687.59	$6,000	7/10/06
9/8/06	$ 9,707.29	$9,000.00	$6,000	9/27/06
10/11/06	$,9637.36	$9,000.00	$6,000	10/30/06
TOTAL AMOUNT		$39,687.59	$28,500	

(Tr. 113-16; Pet. Exs. 2, 12, 14). Mr. Watson explained that several weeks lapsed between his deposits and withdrawals because the checks had to clear before the funds became available (Tr. 116). According to Mr. Watson, once he withdrew the money, he gave it directly to Ms. Bechtold in cash because she did not want to leave a paper trail (Tr. 114).

Mr. Watson initially testified that he had a choice as to whether to give the money to Ms. Bechtold, but clarified on cross-examination that he believed he would have been terminated if he did not return the money to respondents. According to Mr. Watson, everyone else was

kicking back and if he did not do the same, his position would be at risk (Tr. 152-53). He also acknowledged that he kicked back money to respondents because he expected it would lead to him getting health insurance or a pension (Tr. 116-18, 152-53). Mr. Watson said he stopped working for respondents in late 2006, after a dispute with a coworker resulted in Ms. Bechtold directing him to take a leave of absence, from which he did not return (Tr. 122-23).

In addition to the checks that Mr. Watson received as benefits payments between April and October 2006, in March 2007 he received a letter from Ms. Bechtold enclosing a check for $5,000, as a lump sum benefits payment (Tr. 110-11; Pet. Exs. 12, 25; Resp. Ex. M). In her letter, Ms. Bechtold stated that the check was for "partial payment against outstanding benefits due you" and indicated additional partial payments would be forwarded to Mr. Watson "until balance is paid in full" (Pet. Ex. 25). Mr. Watson testified that while he thought he was owed additional benefits, he did not know the exact amount of the debt respondents owed to him and he did not trust Ms. Bechtold to do an accurate accounting of the amount owed, so he returned the uncashed check to Ms. Bechtold (Tr. 111, 125-28).

Respondents' Case

By respondents' account, the Comptroller's allegations largely stem from Mr. Mighty, whom Ms. Bechtold depicted as a demanding employee she tried to accommodate, and from Ms. Bechtold's unfamiliarity with the administrative aspects of her role with the company. Respondents also maintain, with no support whatsoever, that the likeliest scenario is that Mr. Mighty was probably stealing money from Mr. Watson and told Mr. Watson "to make up a story claiming kickbacks to try and fraudulently receive funds from Mackey Reed" (Resp. Br. at 12).

Ms. Bechtold started working full-time for Mackey Reed in 2005 (Tr. 270). She owns the company and her title is president and secretary (Tr. 272). Prior to her full-time employment at Mackey Reed, she was a member of electricians' union Local 3 for about 17 years (Tr. 272). Ms. Bechtold acknowledged that as a member of Local 3, she had worked on prevailing wage jobs, but denied having managerial experience analogous to her role in Mackey Reed or experience administering a certified payroll (Tr. 189, 270-71). According to Ms. Bechtold, BAM was her first prevailing wage job and she was concerned about the size of the project,

especially in the wake of the failure of an expected business partnership to materialize (Tr. 195, 270).

Ms. Bechtold claimed that she acceded to Mr. Mighty's request that she pay him the benefits to which he was entitled on the BAM project by paying him at $43 per hour on private jobs that were not subject to the prevailing wage law. According to Ms. Bechtold, Mr. Mighty asked for this arrangement because he wanted his paystubs to reflect a salary of $43 per hour so he could get a mortgage to buy a house (Tr. 197, 201-08, 329-33). Ms. Bechtold said she complied because she thought it was a reasonable request (Tr. 197). Therefore, according to Ms. Bechtold, $16 of the $43 per hour that respondents paid Mr. Mighty on private jobs represented supplemental benefits that were owed to him (Tr. 330). Respondents and Mr. Mighty did not have a written document memorializing this arrangement and Ms. Bechtold conceded that she did not make a contemporaneous accounting of the payments that reflected this arrangement (Tr. 331-33).

Ms. Bechtold testified that she paid Mr. Watson more benefits than he was due on the BAM projects, noting that the Comptroller's audit reveals that she paid Mr. Watson benefits totaling $39,687.59, when the total prevailing benefits due to him were $35,475.08 (Tr. 190-91; Pet. Ex. 16). According to Ms. Bechtold, she paid Mr. Watson $18 per hour and increased that hourly rate by payments she attributed to benefits because "that's what Ancil wanted" (Tr. 188). Ms. Bechtold intimated that there might have been a tax avoidance motive behind the arrangements: she testified that the issue of taxing benefits had been raised by Mr. Mighty, who became angry when she withheld taxes from his benefits check and told her that he had never been taxed on benefits (Tr. 184-85). Ms. Bechtold said that she looked at the prevailing wage website and understood it to indicate that benefits should be paid in cash, which to her meant it was not taxable (Tr. 188-89). Regarding the allegations that respondents required kickback of supplemental benefits paid to Mr. Watson for the BAM projects, Ms. Bechtold vehemently denied Mr. Watson's testimony that after he deposited the benefits checks, he gave money back to her (Tr. 181).

Respondents submitted certified payroll records to BAM, Inc. as part of the payment requisition process (Tr. 208; Pet. Exs. 5, 7, 26). In submitting the certified payroll, respondents were required to certify that the information contained in the documents represented wages and

supplements paid to their employees. Respondents' certified payroll records indicate that they paid Mr. Mighty an hourly wage of $43 to $44, and supplemental benefits at an hourly rate of $33.93 to $35.51. Respondents also certified that they paid Mr. Watson an hourly rate of $18 to $20, and supplemental benefits at an hourly rate of $58.93 to $61.51 (Pet. Exs. 5, 7). The parties stipulated to the admission into evidence of unsigned copies of the certified payroll records as Petitioner's Exhibits 5 and 7 (Tr. 7). A copy of the certified payroll for the week ending December 28, 2005, signed by Ms. Bechtold, was also admitted into evidence (Pet. Ex. 26).

Ms. Bechtold disputed petitioner's use of the unsigned certified payroll records, maintaining that the documents she signed could be different from the ones to which the parties stipulated and petitioner submitted into evidence as Exhibits 5 and 7 (Tr. 275, 277, 298, 338; Resp. Br. at 11). However, other than generally maintaining that it was possible the documents she signed are somehow different from the ones in evidence, Ms. Bechtold offered no grounds for doubting that the certified payroll records in evidence are copies of the documents respondents submitted to BAM as part of the payment requisition process. Therefore, respondents offered no basis for a challenge to the authenticity or reliability of the certified payroll records. *See Health and Hospitals Corp. (Woodhull Medical and Mental Health Center) v. Carter*, OATH Index No. 2101/06 at 4 n.4 (Nov. 2, 2006) (petitioner's use of unsigned timesheet to prove charges regarding respondent's lateness permitted where there was no reason to believe the timesheets were inauthentic; it was respondent's responsibility to sign the timesheets and he was unable to prove that they were inaccurate). While signed copies of the records would have enhanced reliability,[6] the fact that certified payroll records are unsigned is not fatal to petitioner's case. This tribunal does not require compliance with the technical rules of evidence, including hearsay rules. *See* 48 RCNY § 1-46(d) (Lexis 2013); s*ee also Barrett v. D'Elia*, 102 A.D.2d 890, 891 (2d Dep't 1984) ("the rules of evidence are not binding in administrative proceedings").

Respondents' work on the Armory project started around March 2006 (Tr. 212). Ms. Bechtold maintained that she only became aware that the Armory contract was a prevailing wage project in November 2006, when she received an e-mail requesting certified payroll records (Tr. 211-12, 299-303; Resp. Ex. X). According to Ms. Bechtold, it was not until March 2007 that she determined what, if anything, she owed Messrs. Watson and Mighty relating to the BAM and

[6] The record is devoid of an explanation as to why there are no copies of signed certified payroll records, except for the single signed copy admitted into evidence as Petitioner's Exhibit 26.

Armory projects and sent them checks that they never cashed (Tr. 214-15; Pet. Exs. 10, 12; Resp. Ex. M). She admitted that Mr. Watson never received prevailing wages and supplemental benefits for his work on the Armory project (Tr. 324-25). Ms. Bechtold also conceded that none of the supplemental benefits checks respondents issued to Messrs. Watson and Mighty prior to March 2007 were for benefits owed to them for their work on the Armory project (Tr. 316-20, 324). According to Ms. Bechtold, the checks she mailed to Messrs. Mighty and Watson in March 2007, which they did not cash and mailed back to her, were the only benefits checks she issued to them for their work on the Armory (Tr. 320-21).

Respondents' certified payroll records for the Armory project for March to October 2006 stand in stark contrast to Ms. Bechtold's testimony because they indicate that respondents paid supplemental benefits to Messrs. Watson and Mighty (Pet. Ex. 22).[7] On cross-examination, Ms. Bechtold agreed that respondents prepared and submitted the certified payroll reports to the Armory Foundation around November 2006, after 90% of the work on the project had been completed (Tr. 321). Ms. Bechtold conceded that the certified payroll records report that respondents paid the workers supplemental benefits when in fact they had not done so (Tr. 314-15, 322-24). This is consistent with respondents' internal payroll register, which does not reflect contemporaneous payment of supplemental benefits to the workers (Pet. Ex. 11).

Because the witnesses gave conflicting accounts of critical events, resolution of the charges requires assessment of their credibility. In making a credibility determination, this tribunal may consider such factors as witness demeanor; consistency of the witness' testimony; supporting or corroborating evidence; witness motivation, bias or prejudice; and the degree to which a witness' testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies,* OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

Mr. Watson appeared credible. While he is interested in the outcome of this matter as one of the workers who was allegedly underpaid, his account of the events was detailed and he did not appear to embellish. Moreover, there is documentary evidence in support of his testimony. His credibility is enhanced by his frank acknowledgement that he gave money back to Ms.

[7] As with the BAM certified payroll records, Ms. Bechtold challenged the authenticity and accuracy of the Armory certified payroll records because they are unsigned (Tr. 303-09, 322-24).

Bechtold because he hoped he would later gain an advantage. He also acknowledged that he was not overtly forced to return money to Ms. Bechtold, but explained he felt he had little choice because his job would have been in jeopardy had he refused to do so.

Ms. Bechtold's version of the events, on the other hand, is self-serving and largely not credible. She depicted herself as an inexperienced contractor who was exploited by trusted employees after she made extraordinary efforts to accommodate and appease them. Yet, it is difficult to credit Ms. Bechtold's claimed ignorance about the payment of prevailing wages given her 17 years of experience working on prevailing wage jobs. Moreover, Ms. Bechtold's credibility was compromised by the overall evasive tenor of her testimony. For example, she was unsure whether she submitted signed certified payroll records, but challenged the unsigned versions admitted into evidence, some of which were produced by respondents. She also maintained that it was possible that the certified payroll documents she submitted to requisition payment on the BAM and Armory projects are different from those the parties stipulated were in evidence, and appeared taken aback when petitioner's counsel noted that the certified payroll documents for the Armory had in fact been provided to petitioner by respondents' counsel (Tr. 303-04).

When confronted with a certified payroll for work on BAM that she signed in February 2006, Ms. Bechtold conceded that she inaccurately certified to having paid supplemental benefits when she had not in fact done so. Petitioner introduced into evidence a certified payroll for the week ending December 28, 2005, which Ms. Bechtold signed on February 3, 2006 (Tr. 279-84; Pet. Ex. 26). She admitted that the document is incorrect when it indicates that respondents paid supplemental benefits of $2,062.55 to Mr. Watson and $1,221.48 to Mr. Mighty because, as of the date she signed the document, respondents had not paid any such benefits (Tr. 279-84, 288-90; Pet. Exs. 12, 26). Ms. Bechtold's admitted misrepresentation in this instance compromises her credibility.

In addition, when confronted with her March 28, 2007, letters to Messrs. Mighty and Watson in which she enclosed checks for $1,000 and $5,000, respectively and indicated that it was "partial payment against outstanding benefits" due to them (Pet. Exs. 25, 27), Ms. Bechtold disingenuously claimed it was not an acknowledgement that she owed monies to Mr. Mighty. According to Ms. Bechtold, she sent the letter and check in an abundance of caution, because she

was not sure at the time whether she still owed benefits to Mr. Mighty, although she was certain that she owed benefits to Mr. Watson (Tr. 326-28). Overall, Ms. Bechtold's testimony was unreliable and lacked credibility.

The evidence establishes that respondents underpaid Messrs. Mighty and Watson on the prevailing wage jobs. Respondents' claim that they overpaid Mr. Mighty on private jobs and underpaid him on the BAM and Armory jobs "with the purpose of accounting for the benefits on the prevailing wage jobs" (Resp. Br. at 10; Tr. 197-208), is not supported by the record and, in any event, is not a defense to the charges. According to respondents' calculations, the total amount of their underpayment of Mr. Mighty on the BAM and Armory jobs is almost equal to the amount they overpaid him on the private jobs (Resp. Br. at 10-11). Ms. Bechtold testified that she agreed to the arrangement as a favor to Mr. Mighty, who needed to establish income sufficient to qualify for a mortgage. However, respondents produced no contemporaneous writing or any testimony, other than that of Ms. Bechtold, an interested party, in support of their contention. Given that payment of prevailing wages is required by law and contractors must certify proper payment of such wages, it strains credulity that respondents would enter into an informal agreement of the sort Ms. Bechtold maintains occurred here. It is even more incredible if, as Ms. Bechtold testified, Mr. Mighty suggested the arrangement and was clearer than she was as to its details (Tr. 333).[8]

In any event, were I to credit Ms. Bechtold's assertion that she and Mr. Mighty agreed that respondents would underpay him on the prevailing wage projects and overpay him on the private jobs, such an agreement is one that would contravene the prevailing wage law by permitting employers to avoid their obligations to pay and accurately report payment of prevailing wages. *See* Labor Law § 193(1) (prohibiting an employer from making deductions from an employee's wages except where the deductions are: made in accordance with the applicable law; expressly authorized in writing by the employee and are for the benefit of the employee; related to recovery of an overpayment of wages where the overpayment is due to a mathematical or clerical error by the employer; or to repay advances of salary or wages made by the employer to the employee). *See also Office of the Comptroller v. Abbey Painting Corp.,*

[8] Moreover, there may well have been a basis for respondents paying Mr. Mighty an hourly wage rate of $43 on private jobs as well as on public works projects. Mr. Mighty was identified as respondents' first employee, and was described as their foreperson and an employee in whom respondents entrusted significant responsibility, which may have been the basis for his hourly wage (Tr. 187, 215-18, 270; Pet. Ex. 1).

OATH Index No. 2544/11 at 32 (June 26, 2012), *adopted*, Comptroller's Dec. (July 2, 2012) ("A contractor on a public works job is required to keep and maintain accurate payroll records and to produce them upon request of the Comptroller") (citing Labor Law § 220(3-a)(a)(iii)).

Ms. Bechtold admitted that she underpaid Mr. Watson on the Armory project (Tr. 324-25), and the credible evidence establishes that respondents underpaid him on the BAM projects. Respondents' claim that they underpaid Mr. Watson his wages and overpaid his benefits on the BAM project because that is what he wanted is belied by testimony and documentary evidence. Moreover, Ms. Bechtold's claim that she did so to accommodate Mr. Watson, like the explanation she proffered regarding payments to Mr. Mighty, is not credible.

Therefore, petitioner has established that respondents underpaid two of their employees prevailing wages and/or supplements on the BAM and Armory public works projects. Petitioner seeks $16,497.53 in unpaid wages and supplements for Messrs. Mighty and Watson's work on the Armory project, plus statutory interest at 16%, plus a civil penalty of 25% of the unpaid wages (Pet. Ex. 17). Pursuant to the stipulation of settlement between petitioner and BAM, Inc., BAM, Inc. paid the underpayment in wages and benefits plus 6% interest and a civil penalty at the rate of 10% on the BAM projects. Therefore, petitioner is seeking the remainder of the civil penalty payable to the City of New York on the BAM project (Tr. 16; Pet. Ex. 18). Petitioner also seeks a finding that Ms. Bechtold, as owner and president of Mackey Reed, directly participated in the violation and seeks respondents' debarment for a period of five years (Tr. 16-17). In addition, pursuant to its motion to amend its petition, which I granted, petitioner seeks an award of the amount kicked back to respondents as unpaid benefits (Tr. 167-70).

Petitioner established by a preponderance of the credible evidence that respondents required Mr. Watson to return amounts paid to him as supplemental benefits. While Labor Law Section 220-b(3)(b)(1) provides for the penalty of debarment for a contractor engaged in a kickback scheme, the term "kickback" is not defined in the provision or elsewhere in Article 8 of the Labor Law, which governs public works. This tribunal has applied the definition found in Article 6 of the Labor Law, section 198-b, which provides:

> 198-b. "Kick-back" of wages prohibited
>
> 2. Whenever any employee . . . shall be entitled to be paid or provided prevailing wages or supplements pursuant to article eight or nine of this chapter, it shall be unlawful for any person . . . to request, demand, or receive, either before or after

> such employee is engaged, a return, donation or contribution of any part or all of said employee's wages, salary, supplements, or other thing of value, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent such employee from procuring or retaining employment.

Labor Law § 198-b(2); *Abbey Painting Corp.,* OATH 2544/11 at 30-31 (employer engaged in a kickback scheme when he issued checks to workers, required them to endorse the checks, which he cashed, and demanded return of part of their wages with the understanding that they would lose their jobs if they did not cooperate). Respondents' foreperson told Mr. Watson that he was required to return money to Ms. Bechtold, who told Mr. Watson how much money to give her out of the supplemental benefits checks that Mr. Watson deposited. Mr. Watson gave the money directly to Ms. Bechtold at the jobsite. Mr. Watson understood that if he did not return the money as directed, his job would be in jeopardy. Thus, the evidence supports a finding that Mr. Watson kicked back a portion of the benefits payments he received. Although Ms. Bechtold denied requiring Mr. Watson to kick back supplemental benefits, her credibility is undermined by her evasive and sometimes incredible testimony.

Respondents' falsification of the certified payroll records and issuance of benefits checks from which they required an employee to return part of the payments is evidence of a willful violation of the prevailing wage law. *See Office of the Comptroller v. Colortech Inc.,* OATH Index No. 1777/13 at 5 (Aug. 1, 2013), *adopted,* Comptroller's Dec. (Nov. 18, 2013); *Abbey Painting Corp.,* OATH 2544/11 at 31; *Office of the Comptroller v. A & R Paterno Construction, In.,* OATH Index No. 2248/00 at 9-10 (Oct. 19, 2000); *see also Hull-Hazard, Inc. v. Roberts,* 129 A.D.2d 348, 352 (3d Dep't 1987), *aff'd,* 72 N.Y.2d 900 (1988) (prevailing wage violation is willful where employer "knew or should have known" of the violation).

Petitioner seeks 16% interest for the Armory project underpayment, calculated up to August 31, 2010, to the date specified in its audit. This is the maximum interest rate allowed by the Labor Law. *See* Labor Law § 235(5)(c) (Lexis 2013); Banking Law § 14-a (Lexis 2013). Petitioner also requested that a civil penalty of 25% of the total underpayment be imposed. Section 220(8) of the Labor Law permits interest and a civil penalty to be imposed for prevailing wage violations. In determining the amount of interest and penalty, factors to be considered include the size of the employer's business, the good faith of the employer, the gravity of the

violation, the history of previous violations by the employer, and failure to comply with record-keeping or other non-wage requirements. Labor Law § 235(5)(b), (c) (Lexis 2013); *see also* Labor Law § 220(8). While there is no evidence of previous violations or of the size of respondents' business, there is compelling evidence that respondents willfully violated the prevailing wage law, falsified their certified payroll records, and engaged in a kickback scheme. Therefore, in light of the gravity of respondents' violations, the maximum civil penalty of 25% and the maximum interest of 16% are appropriate with respect to the Armory project. *See Colortech Inc.,* OATH 1777/13 at 6-7; *Abbey Painting Corp.,* OATH 2544/11 at 32-33.

With respect to the BAM projects, while petitioner accepted payment of a 10% civil penalty on the BAM projects pursuant to a stipulation of settlement between petitioner and BAM, Inc., petitioner is seeking the balance of the civil penalty payable to the City of New York. That relief is appropriate. Respondents' conduct in underpaying their employees and requiring the kickback of supplemental benefits on the BAM projects was particularly egregious and respondents should not be insulated from responsibility for paying the civil penalties relating to their conduct.

Petitioner sought a finding that respondents, including Ms. Bechtold individually, as owner and president of Mackey Reed, be debarred for a period of five years from bidding on future public work contracts in New York State. Labor Law section 220-b(3)(b)(1) provides for debarment when two final determinations of willful prevailing wage law violations are rendered against the contractor, which can be consecutive or concurrent, where the contractor falsified payroll records, or where the contractor required kickback of wages or supplemental benefits. Labor Law § 220-b(3)(b)(1) (Lexis 2013); *Colortech Inc.,* OATH 1777/13 at 7; *Abbey Painting Corp.,* OATH 2544/11 at 33. The record supports a finding that respondents underpaid workers on three public works contracts, deliberately falsified payroll records, and engaged in a kickback scheme. Therefore, debarment of Mackey Reed Electric, Inc., and of Ms. Bechtold individually, is appropriate.

FINDINGS AND CONCLUSIONS

1. Respondents violated Labor Law section 220 by willfully failing to pay the prevailing rate of wages and supplemental

benefits to two workers on the BAM and Armory public works projects, as set forth above.

2. Respondents engaged in a kickback of supplemental benefits by issuing benefits checks to Mr. Watson then requiring that he return to Ms. Bechtold a portion of the amount he received as benefits.

3. Petitioner should complete a new audit of the BAM project to calculate unpaid prevailing wages and supplemental benefits in light of the finding that Mr. Watson kicked back $28,500 to respondents.

4. The complainants are entitled to maximum interest, at the annual rate of 16% on the Armory project.

5. Due to the gravity of respondents' violation of the law, respondents should be assessed the maximum civil penalty of 25% of the total violation on the Armory project.

6. Respondents should be assessed the balance of the civil penalty due on the BAM projects, to equal 25% of the total violation, after deducting the portion of civil penalty already paid to petitioner as part of its settlement with BAM, Inc.

7. For their willful failure to pay prevailing wages and supplemental benefits on three public works contracts, their falsification of payroll records, and requiring kickback of supplemental benefits, respondents, including Ms. Bechtold individually, should be debarred from all governmental contracts within New York State for five years.

RECOMMENDATION

I recommend that the petition be granted as set forth above. I also recommend that petitioner revise its audit of the BAM project to calculate unpaid prevailing wages and supplements to Mr. Watson in accordance with the above findings.

Astrid B. Gloade
Administrative Law Judge

January 3, 2014

SUBMITTED TO:

SCOTT M. STRINGER
Comptroller

APPEARANCES:

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CITY OF NEW YORK
OFFICE OF THE COMPTROLLER

In the Matter of the Complaint

-against-

OATH Index No. 1950/2013
Labor Law File No. 20070906

MACKEY REED ELECTRIC, INC. AND
DAWN AVILA (a/k/a DAWN BECHTOLD)

For Violations of Labor Law § 220 *et seq.*

DETERMINATION AND ORDER

Proceedings

The Comptroller's Bureau of Labor Law brought proceedings pursuant to New York Labor Law § 220 et seq. to determine whether Mackey Reed Electric, Inc. ("Mackey Reed") and Dawn Avila (a/k/a Dawn Bechtold) ("Avila") paid the prevailing rate of wages to two (2) employees, Ancil Watson and Barrington Mighty, who worked as electricians.

Honorable Astrid B. Gloade, Administrative Law Judge ("ALJ") of the Office of Administrative Trials and Hearings ("OATH") conducted a two (2) day hearing on August 13, 2013 and August 15, 2013. ALJ Astrid B. Gloade issued a Report and Recommendation dated January 3, 2014.

Determination and Order

After reviewing the ALJ's Report and Recommendation and relevant portions of the record and exhibits thereto, and due deliberation having been had thereon, under the powers and duties vested in me by the Comptroller under Labor Law§ 220 et seq., I adopt, as the Comptroller's Determination and Order, the ALJ's Report and Recommendation, which is annexed hereto, in full.

The amount owed to each employee, including interest of 16% per annum through August 31, 2010, was listed in the "Summary of Underpayment," Petitioner's Exhibit 16 and Exhibit 17 at the hearing. However, the violation amount has been increased for Mr. Watson as set forth in the chart at page 16 of ALJ Gloade's Report and Recommendation, to reflect kickbacks that Mr. Watson paid to his employer, and such adjustments are expressly adopted as set forth in the annexed Summary of Underpayment. By letter dated January 27, 2014, Mackey Reed and Avila were

provided with a copy of the attached Summary of Underpayment and have not objected to it. Interest on the total award to Mr. Watson has been re-calculated accordingly.

Interest on the entire award will continue to accrue at 16% per annum from the date of this Determination and Order until the date of payment.

If any of the employees fail to claim their rewards within six (6) years from the date of this Determination and Order, the unclaimed awards are to be retained by the City of New York as revenue.

Under Labor Law § 220-b, Mackey Reed Electric, Inc. and Dawn Avila (a/k/a Dawn Bechtold) having willfully violated prevailing wage laws, falsified payroll records and employed a kickback scheme, shall be ineligible to bid on or be awarded any public work contract for five (5) years from the date hereof, and pursuant to Labor Law § 220(8), the maximum fine of 25% of the total violations is hereby imposed as a civil penalty.

SO DETERMINED AND ORDERED:

By: Kathryn E. Diaz Dated: June 24, 2014
General Counsel
Office of the Comptroller of the City of New York