Office of the Comptroller v. Paramount Security Group, Inc.

OATH Index No. 2553/15 (Dec. 2, 2015), *adopted in part*, Comptroller's Determination and Order (Feb. 9, 2016), **appended**

In prevailing wage case, services contractor alleged to have underpaid security employees by failing to pay prevailing wages and benefits. After hearing during which contractor admitted failing to pay workers prevailing wages, ALJ found that contractor owed $1.8 million in unpaid wages, benefits, and interest, that the violations were willful, and recommended a civil penalty of 25 per cent. Comptroller adopts recommendation but declines to follow ALJ's finding that the issue of whether the corporate president was personally liable for underpayments was not properly before OATH. The Comptroller found that the president was personally liable as one of the five biggest shareholders who personally participated in the underpayment. If the corporate respondent fails to pay the full penalty, its president will be personally liable for the violation.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
OFFICE OF THE COMPTROLLER
Petitioner
- against -
PARAMOUNT SECURITY GROUP, INC.
and SOLOMON EDOBAR
Respondents

REPORT AND RECOMMENDATION

JOHN B. SPOONER, *Administrative Law Judge*

This is a prevailing wage proceeding brought by petitioner, the Office of the Comptroller, pursuant to section 230 of the Labor Law and Title 44, Chapter 2 of the Rules of the City of New York. The petition alleges that, in 2010 through 2012, respondent Paramount Security Group, Inc. willfully failed to pay prevailing wages and benefits to security guards working at the Health and Hospitals Corporation ("HHC") offices. Respondent Solomon Edobar is the president and owner of Paramount.

A hearing was held before me on October 19, 2015. Petitioner presented the testimony of an investigator and three workers, as well as various payroll records and audits. Respondent appeared and testified, admitting that workers were not paid prevailing wages and benefits as required. Petitioner submitted a written closing on November 9, 2015.

For the reasons provided below, I find that 28 security workers were not paid wages and benefits of $1,873,173.73 as required for service employees under the Labor Law. I further find that a penalty of 25 per cent should be assessed and that the violations should be found to be willful.

ANALYSIS

Section 231 of the Labor Law provides that "[e]very contractor shall pay a service employee under a contract for building service work a wage of not less than the prevailing wage in the locality for the craft, trade or occupation of the service employee." Labor Law § 231(1) (Lexis 2015). The Comptroller, as "fiscal officer" for New York City, determines the prevailing wage and supplements on an annual basis. Labor Law § 230(8).

This case concerns work performed from 2010 to 2013 under a contract for security services by Paramount at two HHC offices located at 125 Worth Street and 346 Broadway in lower Manhattan. Investigator Walters testified that she was assigned to investigate Paramount after a staff member attended a meeting at HHC offices and had a conversation with a security guard about the guard's salary. Following this encounter, 14 of the Paramount guards filed complaints (Pet. Exs. 1-14) with the Comptroller's office (Tr. 37-38). In their complaints, which included pay stubs, the guards indicated that they were paid $11.50 and later $11.90 per hour and no benefits.

On January 2, 2013, Investigator Walters sent respondents a notice to produce payroll records for employees who worked at the HHC offices. On February 6, 2013, Mr. Edobar's wife appeared at Ms. Walters's office and provided some records. No records of overtime or benefits payments or certified payroll records were presented (Tr. 47-48).

The underlying contracts (Pet. Exs. 16 & 17), entered into in 2005 and renewed in 2012, required Paramount to pay prevailing wages to all workers. At the hearing, petitioner produced records regarding the history of the contract, as well as wages paid by Paramount and amounts billed to HHC. Paramount provided a payroll summary sheet (Pet. Ex. 22) covering December

2010 through March 2013 (Tr. 64) and paystubs (Pet. Ex. 23) from November 2010 through February 2013 (Tr. 65-66). This summary and the paystubs reflect that for these periods security guards were paid only $11.50 per hour (Tr. 65, 67). Paramount's time cards (Pet. Ex. 20) from March 2012 through February 2013 (Tr. 58) indicated that various employees were not paid overtime when they worked more than eight hours per day, as required by the prevailing wage law (Tr. 61).

Three security guards, Mr. Day, Ms. Price, and Ms. King, testified at the trial that they had worked for Paramount at the HHC offices from 2012 until March 2013 and were paid $11.50 or $11.90 per hour for both regular work and for overtime and received no benefits (Day: Tr. 122-30; Price: Tr. 139-46; King: Tr. 155-66).

Paramount provided photocopies of cancelled checks (Pet. Ex. 24), accompanied by small slips of paper, which they indicated were payments for overtime (Tr. 68-69). It also provided a summary of overtime payments (Pet. Ex. 25) indicating that security guards were paid $11.50 per hour and supervisors paid $11.90 per hour (Tr. 74). According to the Paramount's invoices (Pet. Ex. 19), Paramount billed HHC at $13.89 per hour for security guards from December 2010 through February 2013.

According to the Comptroller's prevailing wage schedule for service employees (Pet. Ex. 26), the hourly rates for unarmed security guards with more than 24 months on the job were $13.75 in wages and $4.46 in benefits (July – December 2010), $14.35 and $4.56 (January 2011 – July 2012), and $14.60 and $4.73 (July –December 2012). Overtime is required to be paid for hours worked beyond eight per day at one and one-half time the regular paid rate (Tr. 78).

The audit (Pet. Ex. 27) prepared by the Comptroller's office was based upon the payroll summaries, paystubs, and other records submitted by Paramount (Tr. 80-81). The audit took the regular and overtime hours worked by each employee from the computerized timesheets and the sign-in sheets (Tr. 81). The audit indicated that, between December 2010 and March 2013, 28 security staff members were paid less than the prevailing wages due under the applicable prevailing wage schedules for unarmed security guards. The interest was calculated as of April 30, 2014, using the statutory interest rate of 16 per cent.

Mr. Edobar testified that he has been the president and sole shareholder of Paramount since he started the company in 1992 (Tr. 184, 188). He acknowledged entering into a contract in 2005 with HHC for security guard service based upon a bid rate of $13.49 per hour (Tr. 173).

Mr. Edobar stated that, prior to 2005, he had contracts to provide security services with public schools in Westchester County, New York, which also required payment of prevailing wages (Tr. 193-94). From 2010 to 2013, Paramount's average gross annual revenue was $500,000 (Tr. 196).

In his defense, Mr. Edobar contended that, although he was aware of the prevailing wage requirement and Paramount's failure to comply with it, the blame for this noncompliance was due to the refusal of HHC personnel to approve higher wages. He insisted that the hiring and firing of security personal was done by HHC, not by Paramount (Tr. 174). He contended that, as he understood the contract, "any time the prevailing wage goes up, HHC will increase it with the amount that it goes up with, and we pass it along to the employees" (Tr. 177). This meant that HHC would "reimburse" Paramount for any increases required by the prevailing wage law (Tr. 200). He indicated that this happened in 2007, when HHC increased its payment rate by $.40 per hour. This increase was passed along to the Paramount security guards by increasing their hourly salary from $11.10 to $11.50 per hour (Tr. 177).

Mr. Edobar stated that, after 2007, he met with HHC every month and was told that HHC was "working on" adjusting the hourly rate (Tr. 179). Nonetheless, HHC did not authorize any adjustments in the rate (Tr. 179). Mr. Edobar stated that he continued to pay and bill HHC for the original $13.89 hourly rates because HHC told him they were going to adjust the rate and Mr. Edobar believed them (Tr. 184). He was aware that the workers were not receiving any benefits such as health insurance, vacation days, or sick days, which he believed was either to be covered by the supplemental checks (Tr. 247) or was not to be paid because HHC prohibited it (Tr. 250). Mr. Edobar stated that he "know[s] about prevailing wage" but, due to HHC's silence, was unable to increase his workers' salaries (Tr. 184-85). Mr. Edobar stated that he never received overtime, holiday pay, or vacation pay from HHC (Tr. 186). He admitted that he did not withhold taxes on the handwritten supplementary checks (Tr. 225). He stated that the checks were at the regular hourly rate because "HHC have said they don't pay overtime" (Tr. 226-28).

Mr. Edobar testified that, in 2012, he told an HHC manager that "if they didn't put the prevailing wage I'm not going to do it" (Tr. 180). After that, HHC approved a higher rate of $26.25 per hour to be paid to Paramount pursuant to an extension of the contract. This higher rate was never paid to Paramount because, according to Mr. Edobar, the old security director retired and the new security director never authorized the new rate (Tr. 181-82). Mr. Edobar

stated that he was aware in December 2012 that the prevailing wage rate had increased (Tr. 205). He stated that he could not pay this increase because "I don't have that kind of money" (Tr. 213) and could not invoice this amount to HHC "because they specifically instructed me not to do that" (Tr. 233).

Mr. Edobar stated that he has submitted invoices totaling approximately $221,000 to HHC for the prevailing rate adjustment from December 2012 through March 2013 (Tr. 182-83). He stated that HHC "said they're working on it" (Tr. 253).

Mr. Edobar also challenged the accuracy of the Comptroller's audit insofar as it included overtime pay whenever workers put in more than 80 hours in a two-week period (Tr. 185).

It was undisputed that Paramount failed to pay prevailing wages to its security employees from December 2010 to March 2013. Mr. Edobar lays the entire blame for this violation on HHC, which Paramount insisted prevented compliance with the prevailing wage law by refusing to approve increased wages.

Mr. Edobar's testimony that he repeatedly told HHC personnel about the need to pay prevailing wages and was ordered not to do so was not credible. Obviously, Mr. Edobar possessed a significant motive to deny responsibility for the prevailing wage violations in order to avoid a penalty and his uncorroborated testimony could be accorded little weight. As he himself indicated, the HHC contract recognized that prevailing wages were required, suggesting that HHC personnel would approve invoices reflecting prevailing wage increases. Despite Mr. Edobar's professed awareness that the prevailing wages increased during the duration of the contract, he admitted that he never increased the wages paid to his employees or the amounts billed to HHC. The notion that he knowingly violated the terms of his contract based upon verbal directions of HHC personnel, without protesting or seeking approval from a higher authority, was highly improbable.

Even if Mr. Edobar's testimony were fully credited, Paramount's argument that Paramount was not liable for failing to pay the prevailing wage because it could not obtain permission from HHC lacks merit. As noted above, both the contract between HHC and Paramount and numerous bid documents expressly required that the contractor pay the prevailing wage. Furthermore, nowhere does the contract suggest that this term required the approval of HHC. The contract between Paramount and HHC provided:

> During the term of this agreement, the contractor shall be responsible for paying the prevailing wage rate in New York City to all of its security guards.

Pet. Ex. 16 at para. L. The contract also provided that HHC was "not responsible for any type of payroll increase . . . . [e]xcluding prevailing wage requirements." Pet. Ex. 16 at para. N.

Various bidding documents also notified Paramount and the other bidding companies of the prevailing wage obligations under any contract awarded (Pet. Ex. 16, 8/22/05 Terms and Conditions at para. 9). At a bidder's conference on October 14, 2005, attended by Paramount, HHC was asked "how the annual prevailing wage rate increases [will] be passed along each year and will it be allowable to include associated payroll taxes." HHC replied as follows:

> The prevailing wage rate stays the same unless change is made by the City of New York. At the time the contractor will be given the new rate and salary will be adjusted accordingly. Applicable tax deductions are to be made by the employer, selected security company, in accordance with IRS, State and City regulations.

(Pet. Ex. 16, 10/14/05 Bid Request at 4; Tr. 106-09). The provision that the City (rather than HHC) will give the contractor changes in the prevailing wage rates suggests that the contractor was obliged to monitor the wage schedules issued by the Comptroller. In fact, Mr. Edobar was apparently doing just this, since he was familiar with these schedules. In a letter (Pet. Ex. 18) dated December 7, 2012, Mr. Edobar wrote that "the prevailing wage rate has since been significantly increased" and, beginning in May 2013, HHC would be billed at "the new rate" of $24.58 per hour for security guards and $25.88 per hour for supervisors since all of Paramount's security employees had worked with the company for more than 24 months.

Thus, both the contract and the bid documents placed Paramount on notice that it would be their obligation to comply with the prevailing wage requirements by monitoring the prevailing wage schedules and, when new schedules were issued by the Comptroller, raising their employees' wages accordingly. Nothing in the contract or in the bidding documents supports respondents' contention that they needed to await the approval of HHC in order to increase wages and comply with the prevailing wage law.

Petitioner requests that respondents' violation of the Labor Law be found to have been willful. A determination as to willfulness is required as to any violation of section 220. Labor Law § 220(7-a). A violation is willful where an employer "knew or should have known" of the

violation. *Hull-Hazard, Inc. v. Roberts*, 129 A.D.2d 348, 352 (3d Dep't 1987), *aff'd*, 72 N.Y.2d 900 (1988). Mr. Edobar admitted that he has been running his company since 1992 and knew about the prevailing wage requirement (Tr. 184). Despite this knowledge and an awareness in 2007 and in 2012 that the prevailing wage for security workers increased, he underpaid the workers from 2010 to 2013. Based upon these admissions, the violations here must be found to be willful.

Petitioner included a 16 per cent per year interest charge in the audit, the maximum allowed by section 220(8) of the Labor Law, set by section 14-a of the Banking Law. Petitioner also requested a 25 per cent civil penalty. Labor Law section 220(8) permits a civil penalty of up to 25 per cent of the total underpayment to be imposed for prevailing wage violations. The factors to be considered are "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 recordkeeping or other non-wage requirements." Lab. Law § 220(8) (Lexis 2015).

As to the interest and penalty, the large amount of the violations, extending over the course of over two years, warrant imposition of the maximum 16 per cent interest and the maximum 25 per cent civil penalty. *Office of the Comptroller v. Abbey Painting Corp.*, OATH Index No. 2544/11 at 32-33 (June 26, 2012), *adopted*, Comptroller's Dec. (July 2, 2012); *Office of the Comptroller v. Jet Stream Maintenance Corp.*, OATH Index No. 997/11 at 5 (Jan. 24, 2011), *adopted*, Comptroller's Dec. (Apr. 28, 2011).

Finally, petitioner requests that, as the president and sole shareholder of Paramount, respondent Edobar be found "personally liable for failure to pay prevailing wages and supplements." In support of this request, petitioner's attorney cites to section 235 of the Labor Law and to this tribunal's decision in *Office of the Comptroller v. Abbey Painting, Corp.*, OATH Index No. 2544/11 at 33-34 (June 26, 2012).

Neither the Labor Law provision nor *Abbey Painting* supports a determination that Mr. Edobar is, at least at this stage of the proceeding, personally liable for the prevailing wage violations here. Section 235(8) provides that, when a "final determination has been made" that a violation occurred, the "fiscal officer" may file a copy of the order with the county clerk against any officer of a contracting company or any of the five largest shareholders who "knowingly participated in a violation" and this order "shall have the full force and effect of a judgment." Here there has been no "final determination" yet as to a violation. Should such a determination

be made, the Comptroller may then exercise his authority under section 235(8) to file a judgement against Mr. Edobar individually.

Abbey Painting does not require a different result. In that case, Judge Lewis found that the president and owner of the contracting company should be subject to debarment, along with the company itself, but made no finding as to personal liability. In fact, a finding of personal liability would not be possible without additional facts, showing more than a violation of the Labor Law. Under New York law, a shareholder or officer of a corporation cannot be held liable in his or her individual capacity for actions purportedly taken on behalf of the corporation unless a plaintiff alleges and proves that the shareholder exercised control such that he or she "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice." *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc*., 16 N.Y.3d 775, 776 (2011), *citing Morris v NYS Dep't of Taxation and Finance*, 82 N.Y.2d 135, 141-42 (1993). There has been no such allegation or proof in this case. There is thus no basis to hold that Mr. Edobar is personally liable for the unpaid wages and benefits.

FINDINGS AND CONCLUSIONS

1. Respondents violated Labor Law section 230 by failing to pay 28 security workers the prevailing rate of wages and supplementary benefits for work performed under a contract for security services at 125 Worth Street and 346 Broadway in lower Manhattan from December 2010 through March 2013, as set forth above.

2. The evidence supports a finding that respondents' violations of Labor Law section 230 were willful.

3. The complainants are entitled to maximum interest, at the annual rate of 16%, from the date the wages and benefits were payable.

4. Respondents should be assessed a civil penalty of 25% of the total violation.

RECOMMENDATION

I recommend that the petition be granted, that respondents be found to have violated section 230 of the Labor Law and that respondents be found liable for wages, benefits, and interest and a civil penalty, as found above.

John B. Spooner
Administrative Law Judge

December 2, 2015

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. 2553/15

PARAMOUNT SECURITY GROUP, INC. and SOLOMON EDOBOR

For Violations of Labor Law *§§* 230-35

DETERMINATION AND ORDER
Proceedings

The Comptroller's Bureau of Labor Law brought proceedings pursuant to New York Labor Law § 230 to determine whether Paramount Security Group, Inc. ("Paramount") and its president and owner Mr. Solomon Edobor (""Respondents") paid the prevailing rate of wages and benefits to 28 employees who provided security guard services pursuant to a contract between Paramount and New York City Health and Hospitals Corporation ("HHC").

On October 19, 2015, Honorable John B. Spooner, Administrative Law Judge ("ALJ") of the Office of Administrative Trials and Hearings ("OATH"), conducted a hearing in this matter. Respondents were represented by counsel. Following the hearing, ALJ Spooner issued a Report and Recommendation dated December 2, 2015.

Determination and Order

I have reviewed the ALJ's Report and Recommendation, the relevant portions of the record, and the exhibits. Under the powers and duties vested in me by the Comptroller, I adopt the ALJ's Report and Recommendation with one exception, as further discussed below, as the Comptroller's Determination and Order. The ALJ's Report and Recommendation is attached as Appendix A.

First, and in accord with the ALJ's Report and Recommendation. I find as follows. The amounts owed to the employees who worked on the contract at issue. including interest of 16% per annum, are listed in the "Summary of Underpayment." Oath Hr'g Pet'r Ex. 27, copies of which are attached as Appendix B. Interest on the entire award will continue to accrue at a rate of 16% per annum from the date of this Determination and Order until the date of payment.

Moreover, because Respondents consistently failed to pay employees the prevailing rate of wages and benefits for over two years, pursuant to Labor Law§ 235(5)(b), Respondents are also directed to pay the maximum civil penalty of 25% of the total violation.

Second, I decline to follow ALJ Spooner's finding that the issue of whether Mr. Edobor was personally liable for failing to pay prevailing wages and benefits was not properly before the tribunal. In reaching that conclusion, ALJ Spooner relied on *East Hampton Union Free School Dist. v. Sandpebble Bldrs. Inc.,* 16 N.Y.3d 775 (2013), a common law breach of contract case, and held that Petitioner must pierce the corporate veil in order to hold an individual shareholder or officer liable in an administrative hearing brought pursuant to Labor Law§ 235. That case, however. is not relevant to these proceedings.

Labor Law§§ 235(5)-(6), the controlling law on this issue, requires the Comptroller to make a determination on all issues raised at the hearing, including the identity of the five largest shareholders of a corporate contractor and whether its officers "knowingly participated in the [prevailing wage] violation." The Comptroller's determinations on these issues arc relevant to the calculation of the civil penalty and interest owed. *See* Labor Law§§ 235(5)(a)-(c): (6). If the requisite showing is made, the five largest shareholders and officers with knowledge of a violation can be debarred, along with the corporate contractor, and held personally liable if the contractor fails
to pay the full amount of the violation to the Comptroller. *See* Labor law§ 235(6)-(8).

The Petitioner requested specific findings that Mr. Edobor "is one of the five largest shareholders of Paramount" and was "an officer of Paramount who knowingly participated in the willful failure to pay prevailing wages and supplements." During the hearing, Mr. Edobor testified that he was the sole owner and officer of Paramount, that he was aware of the prevailing wage and benefit rates, and that he knowingly paid the employees less than required by prevailing wage laws. Hr'g Tr. at 172-83. Consequently, pursuant to Labor Law§ 235, I find that Mr. Edobor is one of the five largest shareholders of Paramount and an officer who knowingly participated in prevailing wage violations. If Paramount fails to pay the full amount of the penalty assessed, Mr. Edobor is personally liable for the violation.

Finally, I believe it is appropriate to supplement the ALJ's Report and Recommendation on one issue. HHC's conduct in this matter was troubling. Throughout the course of the contract's term and the subsequent extensions, the prevailing wage rates increased. Oath Hr'g Pet'r Exs. 16,

17, 26, copies of which are attached as Aopendix C. This notwithstanding, Respondents and HHC failed to amend the contractual reimbursement rate to account for the increases in prevailing wages and benefits due to the employees. Although Respondents cannot be relieved of their legal obligation to pay prevailing wages and benefits, HHC, a New York City agency with substantial experience in contracting, is expected to be aware of New York City's prevailing wage rates and should avoid entering into or renewing contracts that will obviously and inevitably lead to prevailing wage violations.

SO DETERMINED AND ORDERED:

By: Kathryn E. Diaz
General Counsel
Office of the comptroller of the City of New York

Dated: February 9, 2016