IN THE OFFICE OF THE CITY ADMINISTRATOR

CITY AND COUNTY OF SAN FRANCISCO

In the Matter of:

PACIFIC ENGINEERING BUILDERS, INC.,

Appealing the Assessment of Forfeiture
By the Department of Public Works and
the Office of Labor Standards
Enforcement

Hearings:
January 28, 2004 and February 20, 2004

DECISION

This case is a hearing regarding an assessment of forfeiture, including penalties, by the
San Francisco Office of Labor Standards Enforcement (the "OLSE") and the Department of
Public Works ("DPW") against Pacific Engineering Builders, Inc. ("PEBI"), with respect to
payment of prevailing wages for work on San Francisco Department of Public Works Contract
No. 6065A(R) (the "Contract") for the public work known as Zoo Street (the "Project").
OLSE/DPW assessed the forfeiture and penalties for misclassification of Scrappers,
misclassification of Group 4 Laborers, failure to pay overtime for Saturday work, and failure to
make mandatory contributions to the Training Fund, as required by the San Francisco Charter
section A7.204, the San Francisco Administrative Code section 6.22(E), and the Project contract.
PEBI requested a hearing under Administrative Code section 6.22(E)(8)(a).

On January 28, 2004 and February 20, 2004, City Administrator Bill Lee heard testimony
and argument, and received documentary evidence concerning this matter. Witnesses called by
the parties testified under oath. Kennedy Chan, PEBI President, appeared on behalf of appellant
PEBI. Deputy City Attorney Sheryl Bregman appeared as attorney for DPW and OLSE. At the
hearing, the parties had a full opportunity to present relevant evidence and argument. The parties
also submitted pre- and post-hearing argument. After consideration of all of the evidence and
argument submitted by the parties, the Hearing Officer issues this Decision.
Summary of Decision

The Hearing Officer confirms the forfeiture of backwages, training fund contributions and penalties as assessed by OLSE/DPW. OLSE/DPW established at the hearing that PEBI failed to pay certain of its workers the proper prevailing rate of wage for the type of work performed. PEBI improperly classified certain work as the work of Scrappers and Group 4 Laborers. PEBI also failed to pay overtime wages for certain Saturday work, and did not in this proceeding establish that it was excused from doing so. Finally, PEBI failed to pay certain required training fund contributions. Accordingly, the Hearing Officer finds that the OLSE/DPW properly assessed backwages and penalties against PEBI in the amount of $50,314.84, consisting of back wages of $18,859.44, training fund contributions of $955.40, and penalties of $30,500.

OLSE also argues that the appeal should be denied because it is untimely. OLSE contends that PEBI waived its right to appeal OLSE's assessment when it failed to request a hearing within 15 days, as required by Administrative Code section 6.22(E)(8)(a). Because the Hearing Officer denies this appeal on its merits, it is unnecessary to determine the timeliness issue. Accordingly, the Hearing Officer does not decide and makes no ruling on OLSE's timeliness objection.

Issues Presented

1. Did OLSE/DPW establish that PEBI improperly classified as Stocker/Scrappers workers who were performing the work of Group 3 Laborer?
2. Did OLSE/DPW establish that PEBI improperly classified as Group 4 Laborers workers who were performing the work of Group 3 Laborer?
3. Did OLSE/DPW establish that PEBI failed to pay overtime compensation that was required for Saturday work?
4. Did OLSE/DPW establish that PEBI failed to make mandatory Training Fund contributions?
Procedural Background

This matter arises out of PEBI's performance under San Francisco Department of Public Works Contract No. 6065A(R) (the "Contract") for the public work known as Zoo Street (the "Project"). The Contract requires that PEBI pay its workers on the Project the highest general prevailing wages for the types of work performed, in accordance with local and state law.

During the course of construction, the OLSE began its review of the wages PEBI paid its workers. On October 22, 2001, the OLSE was on site at the Project and advised the PEBI superintendent that the "scraper" classification would not be allowed on non-drywall work. On November 6, 2001, OLSE was on site and advised PEBI that the sign-in sheets were inadequate because they did not show the workers' start times and quitting times. On January 12, 2002, OLSE was on site and observed Saturday work; the DPW inspector informed OLSE that PEBI workers were often working seven days per week plus holidays.

OLSE and PEBI corresponded and communicated a number of times over the course of 2002 and the beginning of 2003. The OLSE issued to PEBI a final assessment on June 27, 2003. The final assessment stated that PEBI may request a hearing within 15 days, and included a copy of the San Francisco Administrative Code section describing the appeal procedure. PEBI sent OLSE additional information that crossed in the mail with the June 27, 2003 assessment. On July 23, 2003, the OLSE and PEBI met to review the June 27 assessment in light of the additional material supplied by PEBI. On July 25, 2003, PEBI advised the OLSE that it intended to resolve the issues without a hearing before the City Administrator. On August 4, 2003, the OLSE revised its assessment. PEBI requested a hearing on December 8, 2003.

In the June 27, 2003 assessment, as revised on August 4, 2003, the OLSE determined that PEBI misclassified certain workers as "scrapers"; misclassified certain workers as Group 4 Laborers; failed to pay its workers overtime; and failed to pay training contributions. The total forfeiture was $52,330.80, consisting of backwages in the amount of $19,873.02, training fund contributions in the amount of $957.78, and penalties in the amount of $31,500.

On January 28 and February 20, 2004, the OLSE, the Department of Public Works, and PEBI appeared before the Hearing Officer for this hearing. Based on new information provided
by PEBI at the hearing, the OLSE/DPW reduced the total assessment to $50,314.84, consisting of backwages in the amount of $18,859.44, training fund contributions in the amount of $955.40, and penalties in the amount of $30,500.

At the hearing, the Hearing Officer admitted into the record the following PEBI Exhibits:

- Exhibit A
- Exhibits C, C.1, C.2, C.3 (with attachments A through E), C.4 (with attachments A through L), C.5 (with attachments A through J), C.6 (with attachments A through I), C.7 (with attachments A through D), C.8, and C.9 (with attachments A through C).

The Hearing Officer admitted into the record OLSE/DPW Exhibits A and B (with attachments 1 through 36).

The Hearing Officer heard the testimony of PEBI President Kennedy Chan, Labor Standards Enforcement Officer Donna Levitt, Engineer Laura Tanigawa, Field Inspector Albert Ko, and OLSE auditor Shirley Trevino.

Legal Standards

The San Francisco Charter mandates the payment of prevailing wages on public work projects:

A7.204. CONTRACTOR'S WORKING CONDITIONS

Every contract for any public work or improvement to be performed at the expense of the city and county . . . whether such work is to be done directly under contract awarded, or indirectly by or under subcontract, subpartnership, day labor, station work, piece work, or any other arrangement whatsoever, must provide:

(b) that any person performing labor thereunder shall be paid not less than the highest general prevailing rate of wages in private employment for similar work . . .

San Francisco Administrative Code section 6.22(E) also requires the payment of prevailing rates of wage by all public work contractors and subcontractors. The definition of the prevailing wage rate includes overtime and holiday work. (S.F. Admin. Code §6.1(H); Cal. Labor Code §1815.) Certified payrolls must conform to the adopted rate of wage for each

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classification and "the classification set forth for each employee [must] conform with the work performed." (Admin. Code §6.22(E)(6) [emphasis added].)

Trade classifications are the basis for determining the appropriate prevailing wage. "The prevailing wage . . . is the highest general prevailing rate of wage plus 'per diem wages' and wages paid for overtime and holiday work paid in private employment in the City and County of San Francisco for the various crafts and kinds of labor employed in the performance of any public work or improvement under this Chapter." (Admin. Code, §6.1(H) [emphasis added].)

Historically, the Board of Supervisors has used both the trade classifications and the wage rate data generated by the California Department of Industrial Relations ("DIR") to set the prevailing wages that are required by the San Francisco Charter and Administrative Code.

Labor Code section 1773 authorizes the DIR to fix the rate for "each craft, classification or type of work." The Court of Appeal upheld the DIR's authority to establish wage rates for each craft and classification in Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal App.3d 120, 128. The Court upheld the long-standing rule that the determination of the classification or type of work covered is an essential step in the wage determination process.

This requirement is also consistent with California Department of Labor Standards Enforcement policy and Federal wage determinations. In its Public Works Manual, the California Department of Labor Standards Enforcement advises:

Employees must be paid the prevailing wage for each type or classification of work they perform. If the employee drives a three-axle dump truck 4 hours, and then works as a laborer 4 hours, his classification would be (1) Teamster (Truck Driver) and (2) Laborer. Separate rates must be used for each. If, however, a worker performs work in a particular craft but also does incidental work which arguably could be classified as a different craft, the worker is to be paid at the rate of the primary craft unless the incidental work is done at a higher paying craft.

As noted in the case of In Re Corley 23 WH 1071 (1978) "Even though some work of a pipefitter is like that of a laborer when the same work is done by a pipefitter as a small or large part of his whole assigned task on any given job, it is the work of a pipefitter, not that of a laborer."

(DLSE Public Works Manual, pp. 55-56.) The United States Department of Labor has likewise determined that, "... If a construction contractor who is not bound by classifications of work at which the majority of employees in the area are working is free to classify or reclassify, grade or
subgrade traditional craft work as he wishes, such a contractor can, with respect to wage rates, take almost any job away from the group of contractors and the employees who work for them who have established the locality wage standard." (In re Fry Brothers, 128 WAB Ruling 76-6, at p. 17.) The court further stated that, "if either the awarding body or a contractor could define or redefine the parameters of work to be done by the various classification of workers, there would be little left of the California prevailing wage laws. Awarding bodies and contractors would simply redefine the scope of work covered by the least costly classification notwithstanding the scope of work for such workers in the locality." (Ibid.)

Failure to pay the prevailing wage rates results in a mandatory assessment of penalties:

Any contractor or subcontractor who shall fail or neglect to pay to the several persons who shall perform labor under any contract, subcontract or other arrangement on any public work . . . [under] this Chapter the highest general prevailing rate of wages . . . shall forfeit . . . back wages due plus the penal sum of $50 per day for each laborer, workman or mechanic employed for each calendar day or portion thereof . . .


A contractor who disagrees with an assessment by the Office of Labor Standards Enforcement may request, within 15 days, a hearing before the City Administrator. (Admin. Code § 6.22(E)(8)(c).) The decision of the City Administrator shall be final. (Admin. Code § 6.22(E)(8)(c).)

Factual Findings

Based on the documentary and testamentary evidence presented, the Hearing Officer makes the following findings of fact:
Misclassification of Scrapers

Based on the scopes of work published by the California Department of Industrial Relations (the "DIR"), the OLSE determined that PEBI misclassified certain workers as "stocker scrapers". The OLSE determined the proper classification for such workers was Laborer:

Group 3. OLSE assessed the difference between the rate paid for stocker scrapper and Laborer Group 3. PEBI contends that stocker scrapper was the correct classification for the work performed.

The classification of "Stocker Scrapper" is included in the DIR prevailing wage determination for the craft of Drywall Installer/Lather. The scope of work published by the DIR describes the work performed by the stocker/scrapper as "stocking and clean-up work associated with metal studs and gypsum drywall installation." The building and installation of wood materials associated with concrete formwork falls within the DIR scope of work for the Carpenter craft, with associated "wrecking, stripping, dismantling, and handling" of concrete forms performed by the Laborer craft.

OLSE and PEBI agree that the PEBI employees classified as "scrapper" on the Project performed stocking and cleanup of concrete forms. PEBI used a subcontractor to perform all of the drywall-lather work for the Project.

PEBI contends that the only difference between the work performed by workers it classified as "scrapers" and the DIR scope of work for the "scapper" craft is that "PEBI's stocking and cleanup work is associated with wood studs instead of metal studs." PEBI argues that whether a worker handled wood or metal should make no difference in determining the proper classification for the work.

The type of material handled by the stocker scrapper, however, is an integral part of the classification. The DIR scope of work for Drywall Installer/Lather refers only to metal studs; there is no reference to any type of wood material. The handling and installation of wood materials associated with concrete formwork is listed in the DIR scope of work for the craft of Carpenter. The two types of materials are not interchangeable—unlike metal studs, the wood used for formwork is temporary and never becomes part of the concrete wall itself. The type of
work performed by employees of PEBI, who PEBI classified as stocker scrapper, is contained in
the scope of work for the craft of Laborer. The DIR scope of work for Laborer includes
"wrecking, stripping, dismantling, and handling concrete forms."

Accordingly, the Hearing Officer finds that PEBI misclassified workers as stocker
scrapers; workers who performed stocking and clean-up of concrete forms must be paid at the
Laborer: Group 3 rate.

**Misclassification of Group 4 Laborers**

The OLSE determined that PEBI misclassified certain workers as Laborer: Group 4 (final
clean-up labor), when the proper classification for the type of work they performed was Laborer:
Group 3 (construction labor). The OLSE reached this determination based on the Inspector
Reports and the DIR scope of work for Laborer. OLSE assessed the difference between the rate
paid for Laborer Group 4 and Laborer Group 3.¹ PEBI contends that Laborer Group 4 was the
correct classification for the work performed.

The scope of work published by the DIR describes the work performed by Laborer Group
3 as that of general construction laborers. The Laborer Group 3 classification also includes
gardener, horticultural and landscape laborer. The DIR scope of work for Laborer Group 4 is
limited to "final clean up work of debris, grounds and building," and, for new construction, a
limited type of "landscape" work. The landscape work allowed within the Group 4 Laborer craft
on new construction is limited to service landscape work (such as gardener, horticulture,
mowing, trimming, replanting, and watering) during the plant establishment period.

PEBI paid none of its workers the Group 3 rate in the first several months of the Project.
The DPW Resident Engineer's daily inspection reports for the days that the Group 4 Laborers
worked, from August 27, 2001 to November 3, 2001, show that during this period, PEBI workers

¹ The OLSE allowed PEBI to use the Laborer: Group 4 classification for three workers on
September 18, 2001, a day that the Inspector reported that PEBI performed, "cleanup at the
storage area in the parking lot." The OLSE also allowed the use of the Group 4 Laborer
classification, for the period October 17 through 19, 2001, when employees were screening sand
from the concrete rubble. The OLSE determined that such work, on this project, met the criteria
of the "Material Cleaner" in the Group 4 Laborer classification.
performed various tasks including: window protection work; repairing an underground water line break; cleanup of storage area on Fleischaker lot; removing, moving, and re-erecting sound barriers (4 days); fabricating framework for translucent panels at field trailers; installing drain lines; moving materials in the parking lot; potholing to expose utilities (11 days); setting boundary barriers for the parking lot; pouring concrete; installing poles for temporary electrical lines; excavation for footings, pads, water lines / removing spoils (13 days); set-up of storage container area; cleanup at storage area; removing trees and fence posts; soil compaction (4 days); building up soil elevations; setting sonotubes (2 days); and backfilling trenches (2 days).

PEBI states that "the workers that were classified as the Group 4 Laborers for the first few months were assigned to set up, clean up the office trailers and containers, and the ground trimming work for the surveyors to set staking." PEBI also contends that a portion of the disputed work was "cleaning and grubbing" work that is closest to the "trimming" work allowed for the Group 4 Service Landscape Laborer. The Hearing Officer is not persuaded by PEBI's arguments.

First, the daily inspection reports describe a variety of general construction tasks, not "final clean-up of debris, grounds, and building." The evidence shows that the work performed falls primarily within the scope of work for Laborer Group 3.

Second, the ground trimming work that was performed also falls within the Group 3 classification. The scope of work issued by the DIR for the Laborer craft states that the type of "landscape" work performed by the Group 4 Laborer on new construction is limited to service landscape work (such as gardener, horticulture, mowing, trimming, replanting, and watering) during the plant establishment period. The Laborer: Group 3 classification includes gardener, horticultural and landscape laborer. The work performed by PEBI employees did not include the maintenance of plants during the plant establishment period; a subcontractor to PEBI performed that work. Testimony from the Resident Engineer and Inspector established that a PEBI employee performed the "cleaning and grubbing" rough-grade work to level an area for the surveyor's staking while using heavy machinery in the beginning of the project before there were
any new plants. The proper classification for this type of "ground trimming" work is Laborer:

Group 3.

Accordingly, the Hearing Officer finds that PEBI misclassified workers as Laborer:

Group 4; workers who performed construction labor tasks not associated with final clean-up
must be paid at the Laborer: Group 3 rate.

Overtime

The OLSE determined that PEBI failed to pay its workers required overtime for 23
Saturdays worked.\(^2\) The OLSE reached this determination based on the certified payroll records.
OLSE assessed the difference between the straight-time rate that PEBI paid and the overtime
rate. PEBI contends that it was excused from paying overtime for Saturday work.

PEBI's certified payroll records ("CPRs") show that its employees worked 24 Saturdays,
beginning the first week of the project in July 2001, without payment of overtime. PEBI's CPRs
also show that the project was never shut down; work was performed every day, Monday
through Friday, during the normal work week preceding each of the Saturdays in question.

PEBI contends that overtime pay was excused because of inclement weather, lack of
materials, and design changes and other unexpected delays on the jobsite. The DIR wage
determination for Laborers provides that "Saturdays in the same work week may be worked at
straight-time if the job is shut down during the normal work week due to inclement weather,
major mechanical breakdown or lack of materials beyond the control of the employer." The
wage determination for Carpenters provides: "Saturdays in the same work week may be worked
at straight-time if the job is shut down during the normal work week due to inclement weather or
major mechanical breakdown."

PEBI contends that underground materials and lumber did not arrive as scheduled and
that concrete was not available as needed. In a letter from PEBI dated June 24, 2003, PEBI also
claims that special order items had long lead times. But PEBI provides no evidentiary basis to

\(^2\) Initially, OLSE assessed PEBI for 24 Saturdays of unpaid overtime. As described
below, OLSE revised that assessment downward to 23 Saturdays based on new information
provided by PEBI at the hearing.
establish that materials required for the Project involved unusual lead times. Nor did PEBI establish that availability of materials was outside its control. Rather, it was PEBI who had full control of ordering the necessary materials and scheduling appropriate delivery in accordance with its project schedule. Moreover, PEBI did not provide any evidence that the project was shut down due to a lack of materials beyond the control of the employer. The Resident Engineer testified that the Project was never shut down due to a lack of materials. PEBI's payroll records corroborate the Engineer's testimony. The CPR's show that the Project was not shut down for any day in the regular work week preceding any of the Saturdays that were paid at straight-time.

PEBI claims that inclement weather interfered with Project work on three days – August 29, August 30, and September 24, 2001. Inclement weather, however, did not require the Project to be shut down on any of these dates. The testimony of the Resident Engineer confirmed that the Project was never shut down, for inclement weather or any other reason, in August or September of 2001. The daily inspection reports detail work performed by PEBI on all three dates. PEBI's certified payroll records confirm that workers worked a regular work day on each of these dates. Moreover, the weather reports from the website Wunderground.com further confirm that there was no rain during the regular work day on any of the three dates claimed by PEBI.3

Finally, PEBI complains that design changes and other unexpected problems at the jobsite caused delays. But PEBI presents no evidence that such problems caused the Project to be shut down. Nor does PEBI offer any evidence that these types of problems fall within the narrow exception to the requirement to pay overtime compensation that is contained in the DIR wage determination.

Accordingly, the Hearing Officer finds that PEBI failed to pay overtime as required for 23 Saturdays during the course of the Project.

3 During the hearing, PEBI claimed that inclement weather shut the Project down on November 12, 2001, and that therefore the following Saturday was properly worked on straight-time. By letter dated February 19, 2004, the OLSE acknowledged the November 12, 2001, inclement weather date and revised its final determination to account for that date.
Training Fund Contribution.

OLSE submitted evidence that PEBI failed to make certain required contributions to the Training Fund. In its written submissions and at the hearing, PEBI contested OLSE's assessment of backwages and penalties, but did not contest OLSE's training contribution assessment or offer any evidence to dispute the appropriateness of this assessment. The Hearing Officer finds that the evidence in the record establishes that PEBI failed to make certain required contributions to the Training Fund.

Summary of Decision

For all of the above reasons stated above, PEBI shall forfeit to the City and County of San Francisco the amount of $50,314.84 from its contract balance on San Francisco Department of Public Works Contract No. 6065A(R) for the public work known as Zoo Street. The OLSE shall distribute such funds in accordance with San Francisco Administrative Code section 6.22(E)(8)(d).

Dated: 1/7/2005

[Signature]

WILLIAM L. LEE
City Administrator
PROOF OF SERVICE

I, MARY GO, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, Suite 325, San Francisco, CA 94102

On January 7, 2005, I served the attached:

HEARING OFFICER'S DECISION

(In the Matter of Pacific Engineering Builders, Inc. Appellant, Appealing the Assessment of Forfeiture By the Department of Public Works and the Office of Labor Standards Enforcement)

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

Kennedy Chan
Pacific Engineering Builders, Inc.
1009 Terra Nova Blvd.
Pacifica, CA 94044

Sheryl Bregman
Deputy City Attorney
San Francisco City Attorney's Office
Construction Team
Fox Plaza, 1390 Market Street, 6th Floor
San Francisco, California 94102-3408
Counsel to OLSE/dpw

VIA FACSIMILE AND U.S. MAIL)

Fax: (415) 255-0733

Donna Levitt, Manager
The Office of Labor Standards Enforcement
City Hall, Room 430
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4698

Fax: (415) 554-6291

and served the named document in the manner indicated below:

☑ BY MAIL: I caused true and correct copies of the above documents, by following ordinary business practices, to be placed and sealed in envelope(s) addressed to the addressee(s), at the City Attorney's Office of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, Suite 325, City and County of San Francisco, California, 94102, for collection and mailing with the United States Postal Service, and in the ordinary course of business, correspondence placed for collection on a particular day is deposited with the United States Postal Service that same day.

☑ BY PERSONAL SERVICE: I caused true and correct copies of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) and I caused such envelope(s) to be delivered by hand on the office(s) of the addressee(s).

☑ BY FACSIMILE: I caused a copy(ies) of such document(s) to be transmitted via facsimile machine. The fax number of the machine from which the document was transmitted was (415) 554-4747/(415) 554-4699. The fax number(s) of the machine(s) to which the document(s) were transmitted are listed above. The fax transmission was reported as complete and without error. I caused the transmitting facsimile machine to print a transmission record of the transmission, a copy of which is attached to this declaration.
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.


[Signature]

MARY GO