

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 02 February 2016

CASE NO.: 2015-DBA-00017

In the Matter of:

Disputes concerning the payment of prevailing wage rates,
fringe benefits, and falsification of records by:

PASCACK BUILDERS, INC.,
Prime Contractor,

TRI-STATE BUILDING COMPANY,
Subcontractor,

FRANKLIN PETTY, JR.,
Owner,

and

Proposed debarment for labor standards violations by:

TRI-STATE BUILDING COMPANY,
Subcontractor,

FRANKLIN PETTY, JR.,
Owner,

Respondents.

DECISION AND ORDER

This matter arises under the Davis-Bacon Act (“DBA”), as amended, 40 U.S.C. § 3141, *et seq.*, as denoted in 29 C.F.R. Part 5, the Contract Work Hours and Safety Standards Act (“CWHSSA”) as amended 40 U.S.C. 3702 *et seq.*,¹ and the implementing regulations found at 29 C.F.R. §§ 5.11(b), 5.12. The DBA is designed to give local laborers and contractors a fair opportunity to participate in federal building programs, to protect employees of government contractors from substandard wages, and to promote the hiring of local labor rather than cheap

¹ The CWHSSA is a Davis-Bacon Related Act. See 40 U.S.C. 3141 *et seq.*; 29 C.F.R. § 5.1. The Davis-Bacon Related Acts incorporate the Davis-Bacon prevailing wage requirements into contracts between a non-federal entity, such as a State or local government, and a contractor where the Federal government provides funding indirectly.

labor from distant sources. *United States v. Binghamton Const. Co.*, 347 U.S.171, *reh'g denied*, 347 U.S. 940 (1954).

This case involves a federal contract for work performed on a Multi-Jurisdictional Port facility, specifically construction of a pre-engineered building for a Marine Storage and Emergency Port Operations Center in Narragansett, RI. JX 1. The Regional Administrator, Wage and Hour Division, United States Department of Labor, issued an Order of Reference on March 3, 2015 asserting the failure to pay prevailing wage rates and fringe benefits, and falsification of payroll records was willful and seeking debarment. The Order of Reference alleges, the subcontractor Tri-State Building Co. and Franklin Petty, Jr., owner, failed to pay two employees prevailing wage and fringe benefits for all hours worked, and falsified certified payroll records warranting debarment. The total of the violations for the two employees was originally alleged to be \$10,462.83, but post-hearing is alleged to total \$8,784.41, TR 6. The Order of Reference further alleges, Pascack Builders, Inc., as the prime contractor, is responsible for paying the back wages owed to the two Tri-State Building Co. employees.

A hearing was held on September 3, 2015 in Providence, RI. Pascack Builders, Tri-State Building Co and Frank Petty Jr. all appeared *pro se*. The hearing transcript is referred to as TR. The following exhibits were admitted into evidence: Joint exhibits (JX) 1-18; Pascack Builders exhibits (Pascack EX) 1-3. TR 6-7. Tri-State Building exhibits (Tri-State) were not admitted. TR 189-197. Testimony was heard from Nelcy Agudelo, the Wage and Hour investigator, Nancy DiPietro, her supervisor, Mark Shovlin, president/owner of Pascack Builders, Franklin Petty, Jr., president/owner of Tri-State Building, and from John Smith an employee of Tri-State.

For the reasons discussed below, I find Respondents violated the DBA and CWHSSA in failing to pay prevailing wage and fringe benefits. I further find Respondents, Tri-State Building and Franklin Petty, Jr., falsified payroll records and debarment is warranted for a period of three years.

I. PARTIES' STIPULATIONS

The parties stipulated the following:

1. Mark Shovlin, President of Pascack Builders, Inc. ("Pascack Builders"), entered into a contract with the Town of Narragansett (Contract No. EMW-2011-PU-APP 00211) on or about August 8, 2013 for construction services on a Multi-Jurisdictional Facility (Marine Storage and Emergency Port Operations Center) in Narragansett, RI.
2. The Davis Bacon Related Acts, as denoted in 29 C.F.R. Part 5, and the applicable regulations issued thereunder at 29 C.F.R. Part 5, §§ 5.11(b) and 5.12 apply in this case.
3. Mark Shovlin entered into a contract with Franklin Petty, Jr., owner of Tri-State Building, on or about December 10, 2013, for construction services on a Multi-Jurisdictional Facility located in Narragansett, RI. Tri-State served as the subcontractor on this project. This contract references the prevailing wage rate and fringe benefit rate for ironworkers. The terms of this contract also discuss the subcontractor's agreement to

comply with all requirements of any wage determinations or other applicable labor standards.

4. Wage and Hour's investigation of Respondents covered the period from July 1, 2012 through June 20, 2014.
5. Mr. Petty employed two ironworkers during the contract period, John Smith and Scott Reid.
6. Ironworkers were to be paid a prevailing wage rate of \$32.81 per hour and a fringe benefit rate of \$22.22 per hour, for a total rate of \$55.03 per hour.
7. Franklin Petty, Jr. signed all certified payroll records on behalf of Tri-State Building during this project.
8. Respondents were notified via certified mail of the Administrator's findings on August 26, 2014. The Administrator referenced the relevant labor standards provisions of the Davis-Bacon Act and Department of Labor regulations that were violated.
9. Both Respondents filed a timely request for a hearing. Upon receipt of these requests for a hearing, the Administrator referred the case to the Chief Administrative Law Judge.

JX 18.

II. EVIDENCE SUBMITTED

1. Documentary Evidence
 - a. Contract between Town of Narragansett, RI and Pascack Builders Inc. JX 1
 - b. Request for Bids from Town of Narragansett JX 2
 - c. Contract between Tri-State Building Co. and Pascack Builders, Inc. JX 3
 - d. Tri-State Building certified payroll records JX 4
 - e. Tri-State Building timecards JX 5
 - f. John Smith's Daily Log JX 6
 - g. Pascack Builders Daily Project Reports JX 7
 - h. John Smith's cancelled checks JX 8
 - i. Scott Reid's cancelled checks JX 9
 - j. Spreadsheet for Back Wages – Scott Reid (original and amended) JX 10
 - k. Spreadsheet for Back Wages – John Smith JX 11
 - l. Summary of Unpaid Wages (WH-56) JX 12
 - m. Determination Letter for Pascack Builders JX 13
 - n. Determination Letter for Tri-State Building JX 14
 - o. Request for Withholding of Funds JX 15
 - p. Tri-State Building's Request for Hearing JX 16
 - q. Pascack Builder's Request for Hearing JX 17
 - r. Pascack's Correspondence to Amille Coppola (8/28/2014) EX 1

- s. Pascack's Correspondence to Hon. Stephen Henley (5/14/2015) EX 2
- t. Pascack's Correspondence to Judge Geraghty (7/16/2015) EX 3

III. PARTIES' POSITIONS

The Department's Wage and Hour Administration maintains Tri-State Building failed to pay the two ironworkers for all hours worked and falsified payroll records. Adm. Br. at 16-25. In determining all hours worked were not paid, the Administrator relied upon the hours recorded by John Smith in his daily log book, rather than the hours recorded on timecards and certified pay roll records. *Id.* The Administrator asserts the prime contractor Pascack Builders and the subcontractor, Tri-Sate are jointly liable for the back wages. Adm. Br. at 32. Finally, the Administrator seeks to debar Tri-State and Frank Petty, Jr. for three years. Adm. Br. at 28.

Tri-State and Pascack assert timecards were kept and both employees, John Smith and Scott Reid, signed timecards. Tri-State contends John Smith signed payroll checks and that the signature on his checks matches the signature on the timecard. Tri-State Br. at 1.² Mr. Petty, for Tri-State acknowledges his record-keeping was "not very good" but he has since "hired a professional to handle the paperwork so this won't happen again." *Id.* Mr. Petty asserts by the end of the contract he had caught up and paid the two employees all wages owed. TR 234-236. Tri-State and Pascack maintain the allegations of unpaid wages by John Smith are the result of a "salting" campaign supported by the union. Tri-State Br. at 1; Pascack Br. at 2.³ For its part, Pascack laments that it did not have any direct role in the employment or payment of Tri-State employees. Yet Pascack is the entity whose funds have been retained, at a time it has already paid Tri-State funds owed under the contract between the two entities. Pascack Br. 1-2.

IV. HEARING TESTIMONY

Nelcy Agudelo

Ms. Agudelo is the Wage and Hour Investigator who conducted the investigation of Pascack Builders, Tri-State Building ("Tri-State") and Franklin Petty, Jr. at the Multi-Jurisdiction Facility in Narragansett, RI, based upon a complaint. TR 16, 19. She testified the period of investigation was July 1, 2012 through June 20, 2014. TR.21⁴ Ms. Agudelo found two employees, ironworkers, were affected by her investigation. TR 21. Ms. Argudelo testified the Wage Determination in the contract required Respondents to pay \$32.81 per hour and a fringe benefit rate of \$22.22 per hour, for a total rate of \$55.03 per hour. TR 21-22; JX 18 # 6. During her investigation, she contacted John Lawless the contracting officer for the Town of Narragansett on this job and learned it was a federally funded construction project with funds

² Tri-State's post-hearing brief is a one page letter dated October 29, 2015.

³ Pascack's post-hearing brief is a two-page letter dated October 30, 2015.

⁴ It is unclear why the period of investigation covered July 1, 2012 to June 30, 2014. I note the Administrator's brief states it began its investigation of Tri-State in June 2014, but fails to cite record evidence. See Br. at 4.

coming from Homeland Security and the Federal Emergency Management Agency (FEMA). TR 20. Thereafter, Investigator Agudelo contacted Kathy Shea of Pascack Builders, and Mr. Petty of Tri-State requesting records, including contracts, project information, and certified payrolls. TR 22-23. She also spoke with John Smith, one of the affected employees of Tri-State, but was never able to contact the second employee, Scott Reid, despite numerous efforts. TR 22.

Ms. Agudelo testified that in response to her request for documents, she reviewed Pascack Builders Daily Log Report which she received from both Pascack Builders and Mr. Lawless, the contracting officer for Narragansett, as Pascack was required to submit the Daily Project Reports to the Town of Narragansett.⁵ TR 23-24. She also reviewed timecards and certified payrolls obtained from Mr. Petty, as well as cancelled checks he provided reflecting wage payments he made to the employees. TR 23-25. Finally, she spoke with John Smith, one of the employees, who provided Ms. Agudelo photographs of the checks provide him for work on this job, as well as a daily log book he kept noting the job site. TR 23-27; JX 6.

Investigator Agudelo discredited the timecards Mr. Petty provided based upon Mr. Smith's assertion he never received or signed a timecard. TR 25-28. She noted Mr. Smith's daily log recorded the number of hours he worked, daily mileage and occasionally weather conditions affecting hours worked. TR 26-27. During the course of her investigation, she concluded Mr. Smith's daily log of hours was credible. TR 27. In reviewing the documents received, Ms. Agudelo noted Mr. Smith's Daily Log and the Pascack Daily Project Reports were not consistent with the certified payroll records Mr. Petty submitted. TR 27-28. Ms. Agudelo testified the Pascack's Daily Project Reports for each day reflected the weather conditions on the job site, the number of Tri-State employees on the job site each day, whether Tri-State employees were affected by poor weather. TR 24-25, 27; JX 7. Investigator Agudelo said the Daily Project Reports were helpful in her investigation. TR 24-25, 27.

She pointed out inconsistencies between the certified payroll records submitted by Mr. Petty and Mr. Smith's Daily Log and the Pascack Daily Project Report. TR 27-28. For example, she first compared the certified payroll records with Mr. Smith's daily log. She testified, the certified payroll records for the week ending March 8, 2014 indicated Mr. Smith worked 23 hours compared to Mr. Smith's daily log which reflects he worked 24 hours. TR 28-29. See JX 4 at 1; JX 6 at 1. For the week ending March 15, 2014, the certified payroll records reflect Mr. Smith worked 27 hours that week. TR 29; JX 4 at 3. In contrast, Mr. Smith's daily log states he worked 34 hours in that week. TR 29; JX 6 at 2. Similarly for the week ending March 22, 2014, the certified payroll records state Mr. Smith worked 16 hours, whereas Mr. Smith's log indicate he worked 31 hours. TR 29-30; JX 4 at 5; JX 6 at 3. The certified payroll records for March 27, 2014 reflect Mr. Smith worked zero hours that day and his Daily Log indicates he worked 8 hours. TR 30; JX 4 at 7; JX 6 at 6. For the week ending April 26, 2014, the certified payroll records do not list Mr. Smith's name. TR 30; JX 4 at 12. Mr. Smith's Daily Log records 24 hours worked for that same week. TR 30-31; JX 6 at 8.⁶ Based upon her review of the certified

⁵ Ms. Agudelo referred to the Pascack Daily Project Reports as the Pascack Daily Log. TR 23-24, 27. The document itself is titled PBI Daily Project Report. JX 7. I will refer to this document as the Pascack Daily Project Reports.

⁶ Contrary to Ms. Agudelo's testimony, Mr. Smith's Daily Log for the week ending April 26, 2014 records 30 hours worked. JX 6 at 8.

payroll records and Mr. Smith's Daily Log, Ms. Agudelo concluded the certified payroll records recorded fewer hours than the hours Mr. Smith actually worked. TR 32.

Investigator Agudelo also noted there were days Pascack's Daily Project Reports recorded Tri-State employees to be on the jobsite and the Tri-State certified payroll records indicated no employees worked that day. TR 27-28. Ms. Agudelo next examined the Pascack Daily Project Report to evaluate whether it supported either the certified payroll records or Mr. Smith's Daily Log. TR 28, 32. She said she reviewed Pascack's Daily Job Report, not for hours, but to confirm the presence of Tri-State workers on the jobsite. TR 28. Pascack's Project Report for March 14, 2014 notes "Heavy a.m. snow yesterday [March 13]. Tri-State leaves at 9:00 a.m. Only two hours worked." JX 7 at 7. And in parenthesis it notes "[n]o report done." TR 32-33; JX 7 at 7. The investigator noted Mr. Smith's Log Book for March 13, 2014, states he worked two hours that day and there was "snow/rain." JX 6 at 2. In contrast, the certified payroll record for March 13, 2014 reflects zero hours for Mr. Smith. JX 4 at 3. Likewise, for March 17, 2014, Ms. Agudelo noted Smith's Log Book records him working 2 hours that day. TR 34-35; JX 6 at 3. The certified payroll records for March 17 record zero hours. TR 35; JX 4 at 5. Pascack's Daily Job Report for March 17, indicates three Tri-State employees were on site and notes "High winds and very cold. Tri-State leaves at 9:00 Unable to continue due to wind" indicating Smith worked 2 hours. TR 35; JX 7 at 8. Because Tri-State employees typically began working at 7:00 a.m, she viewed Mr. Smith's Daily Log and the Pascack Daily Project Report as consistent and contrary to the hours listed on the certified payroll record. TR 35-36. For March 21, Pascack's Daily Job Report notes three Tri-State employees on site, weather was clear and an effective workday of 100%. TR 36-37; JX 7 at 11. Mr. Smith's daily log counts him as working 5 hours that day. JX 6 at 3; TR 35. The certified payroll records for this date indicate zero hours for Mr. Smith. JX 4 at 5; TR 37. For April 18, 2014, Pascack's Daily Project Report notes three Tri-State employees are present, the log does not indicate employees left early and reflects an effective work day of 100%. JX 7 at 26; TR 37-38. Mr. Smith's Log Book for that date indicates he worked 8 hours. JX 6 at 7; TR 38. However, the certified payroll records for April 18 record zero hours worked. JX 4 at 11. The investigator concluded that Smith's Daily Log Book and Pascack's Daily Job Report corroborated one another. TR 36, 38-39. Therefore, she determined the certified payroll records were inaccurate. Consequently, she credited the hours Mr. Smith recorded in his Daily Log Book and used these hours to calculate back wages for both Mr. Smith and Mr. Reid. TR 39-40.⁷

In calculating the back wages owed Smith and Reid, the investigator reviewed the checks Mr. Petty provided her and the checks Mr. Smith received and photographed before presenting the check to the bank for payment. TR 40-41; JX 8; JX 9. As an initial matter she noted the checks did not appear to be payment in full for hours worked, some appeared to have been backdated, and the checks had not been provided to the employees when due. TR 42-47. She

⁷ Ms. Agudelo testified she did not utilize the timecards in calculating the back wages owed. TR 25-26. She explained that after receiving the timecards from Mr. Petty, she asked Mr. Smith whether he had filled out timecards on this job and he responded there were no timecards. TR 26. When she sent him a copy of a timecard she obtained from Mr. Petty, Mr. Smith denied he had signed timecards and said he had no knowledge of timecards. *Id.*

also explained she was not able to match the dates of checks to the certified payroll records, nor could she match the amount of all checks to the certified payroll records. TR 48.

To calculate the back wages owed, Ms. Agudelo prepared a spreadsheet for Mr. Smith and Mr. Reid, using the hours Mr. Smith notated on his Daily Log. JX 10; JX 11. The column labelled "Payment by Employer" reflects all the payments she could confirm from Mr. Petty to each employee. TR 49. Ms. Agudelo conceded that some of the checks she recorded in the "Payment by Employer" column and credited to Tri-State were gross amounts and some of the check amounts were net amounts. TR 48-55, 59-61. She explained Mr. Smith told her that near the end of the project he received payroll checks with deductions. TR 49-50. For the two checks she credited Mr. Petty the gross amount, she first looked to see if the check amount received by the employees lined up with the amounts listed on the certified payroll records. If the two sums matched, she then used the certified payroll record to obtain the gross amount of the check received by the employees. TR 50. For example, for Mr. Reid, she explained Check No. 5167 (JX 9 at 8) was for \$832.64, and she noted the certified payroll record included a payment of \$832.64. TR 51-52 (JX 4 at 11). In preparing the spreadsheet for Mr. Reid, she looked to the certified payroll records coinciding with the check for \$832.64, (JX 9 at 8) to obtain the gross amount of Check No. 5166, which was listed as \$1045.57. TR 50-52, 57 (JX 4 at 11). She credited Mr. Petty with paying Reid \$1045.57 and included that amount on the spreadsheet for Mr. Reid. (JX 10 at 2).⁸ Ms. Agudelo performed the same exercise for Mr. Smith. TR 62. Check No. 5166 for \$842.27 paid to Smith for pay period 4/14/2014-4/20/2014 (JX 8 at 10) lines up with the certified pay roll record for that pay period reflecting a net payment of \$842.27 (JX 4 at 11). She credited Petty with the gross amount of this check \$1045.57 which is reflected on the spreadsheet for Mr. Smith. (JX 11). The investigator explained for the checks given to employees in amounts that did not match payment amounts reflected in the certified payroll records she received from Mr. Petty, she was unable to determine the gross amount for those checks. TR 49-50-52, 54-55, 59-61. Ms. Agudelo took the total hours worked from Mr. Smith's Daily Log and multiplied that by the hourly wage rate of \$55.03 to obtain the total due each employee. TR 56-57, 61-62. She then compared that to the total paid to each employee and the shortfall is the back wage due each employee. TR 56-58. For Mr. Smith she calculated wages due in the amount of \$5,694.42. TR 67-68; JX11. For Mr. Reid, she used the number of hours recorded in Smith's Daily Log except for the periods Mr. Reid was not at work. TR 56. Her back wage calculation indicated \$3,089.99 due. JX 10 at 2; TR 57-58.⁹ Ms. Agudelo conceded that her wage calculations may overstate the amount of back wages due as she was unable to determine the gross amount for checks that failed to match up with certified payroll records, or check that did not include paystubs reflecting deductions taken. TR 59-61.

Finally, Ms. Agudelo asserted debarment is appropriate based upon her opinion there was a willful falsification of payroll records and underreporting of hours. TR 68-69.

⁸ Similarly, Check No.5168 (JX 9 at 9) for \$1,265.84 to Mr. Reid does not appear on the spreadsheet prepared by the investigator (JX 10 at 2). TR 53-54. Rather, the investigator looked at the certified payroll records for a net amount of \$1,265.84 and credited Mr. Petty with the gross amount of \$1,650.90 (JX 4 at 12), which is included on her spreadsheet for Mr. Reid. (JX 10 at 2). .

⁹ Mr. Reid had fewer hours as he did not work the week ending March 29 due to injury. TR 57-58.

Nancy DiPietro

Nancy DiPietro is investigator Agudelo's supervisor. TR 88-89. She testified that as a result of the investigation, funds were withheld under the contract. TR 93. The Town of Narragansett withheld funds in the amount of \$10,462.83 based upon a letter from the Department of Labor's Wage and Hour Division. TR 94; JX 15. The funds withheld were funds the Town of Narragansett owed the prime or general contractor, in this instance Pascack Builders. TR 97. Ms. DiPietro explained when the investigation is completed the investigator holds a final conference providing the employer with the findings. TR 95. On cross-examination by Pascack Builders, Ms. DiPietro conceded the prime contractor is not notified of this final conference because the focus for Wage and Hour is "the company---the sub who we set up and who we've investigated. We will -- the prime has the right to be there if they want to be there." TR 96-97.

John Smith

Mr. Smith was employed by Tri-State as one of the two ironworkers on the Multi-Jurisdiction Facility Project at issue. TR 100-101. He has worked in the construction industry for 15 years and been a member of Local 37 Iron Workers Union for the last 11 years. TR 101-102. He testified he has worked on many federally funded construction projects, and is aware that on such projects there is a prevailing wage and benefit amount paid to employees. TR 103. On the project in question, he knew the prevailing wage including fringe benefits for his category, iron worker, was \$55.03. *Id.* Mr. Smith testified he had worked with Mr. Petty on approximately six projects prior to the Multi-Jurisdiction Facility Project at issue. TR 104. He testified there was never an issue with wage payments or with being paid for all hours worked on any of the other projects he worked for Mr. Petty. *Id.* Mr. Smith reported there was one other ironworker, Scott Reid working on this Multi-Jurisdiction Project in Narragansett. TR 106. There was also a third person, he knew only as "Country" who was a laborer and worked with them on the project. TR 106-107.

Mr. Smith testified he usually carpooled to the job site each day with Mr. Reid. TR 109. Mr. Reid picked him up at his residence and dropped him off each day after work. There were just a few days when he did not carpool with Mr. Reid, explaining that Mr. Reid missed work the week of March 24 after injuring his back on the job, and missed two or three additional unspecified days for other appointments Mr. Reid attended. TR 109-111. Smith testified he and Reid arrived at the job site between 6:40 and 6:50 a.m. but began their shift at 7:00 a.m. TR 112-113, 119. They typically left between 3:15 and 3:30 p.m. TR 112-113, 119-120. Smith said the workday was eight hours. TR 120. They took half an hour for lunch. *Id.* Mr. Smith said a Pascack employee was on site daily, and would open the gate for them each morning. TR 126-127.

Mr. Smith kept a daily log book in which he recorded the total hours he worked each day. TR 115; JX 6. Mr. Smith testified he kept the daily log book because once he learned the job was a prevailing wage job and he was not being paid the prevailing wage, he decided he "better start keeping records for---instances like today." TR 116. Mr. Smith's daily log book recorded the date, location of job site, hours worked, the mileage to and from his residence and the job site, and whether weather conditions impacted hours worked on a particular day. *Id.*; JX 6. He

also testified he kept similar daily logs of his hours on every job he worked on. TR 117-118. Mr. Smith testified the entry in his daily log book for March 13 indicates he worked two hours that day and includes a notation “snow/rain.” TR 121; JX 5 at 2. He explained this means he worked for 2 hours that day and then snow and rain stopped their work for the remainder of that day. *Id.* Smith testified and his daily log book notes his last day working on this project was April 25. TR 121-122.

Mr. Smith testified he does not recall seeing a timecard during the period he worked for Tri-State on the Multi-Jurisdiction Project. TR 122. He claimed the first time he saw a timecard was during the investigation of this case, when Investigator Agudelo e-mailed him a copy of one of the timecards and asked him whether it was his signature on the timecard. TR 122-123. Mr. Smith denied signing any of the timecards included in JX 5. TR 122, 149-150. He maintained he has a very common name and that he has learned to have a signature that is identified to him and him only. TR 123. For this identifying signature he always makes a circle above the letter “i” in Smith. TR 123-125. He testified he knew the signatures on the timecards were not his because there is no circle above the letter “i”. TR 123. Although he did acknowledge for one of the time cards at JX 5 at 5, the signature is similar to the way he signs his name, he denied signing this specific time card. TR 123-125. Smith stated that Mr. Petty was usually at the job site each morning and gave them the tasks for the day, and then would usually leave to check on or to bid on other jobs. TR 112, 159. Sometimes Mr. Petty would return to the job site at the end of the workday and some days he would not. *Id.* Smith agreed that if Mr. Petty had not been at the jobsite at the end of the shift the previous day, the following morning Mr. Petty would ask the employees what time they stopped work the previous day. TR 160, 163-164.

Mr. Smith reported he photographed the pay checks he received from Mr. Petty. TR 127-129. JX 8. Smith explained he photographed the checks because the pay he received was not correct and he “wanted to make sure that if it came down to event like this, he [Petty], got credit for what he paid me, and I got credit for what I was owed.” TR 129. Mr. Smith testified he received only one check that included a paystub detailing deductions. TR 132-133; JX 8 at 7. Smith stated that at Mr. Reid’s request, he also photographed some of the paychecks Mr. Reid received from Mr. Petty. TR 129-130. Smith testified he went to Mr. Petty’s bank to cash checks on the day he received the check, as he was concerned the check might bounce. TR 130-131. However, on cross examination he admitted his practice on all jobs was to cash his paycheck when he received it. TR 146-147. Mr. Smith further conceded that he had never had a check from Mr. Petty bounce. TR 157.

Mr. Smith recalled he did not always receive the checks on the dates written on the checks. For example, he explained that in the instance in which he photocopied three checks together, (Check nos. 722, 725 and 727) he would have received all three checks on the same day. TR 127-128, 134; JX 8 at 11. His testimony in this regard is corroborated by Mr. Petty’s testimony that the printed notation on the bottom of the copy of each cancelled check his bank provided him, reflected the date the check was presented for payment. TR 137-138. For Check Numbers 722, 725 and 727, the cancelled checks from the bank indicated all three checks were cashed on April 21, 2014. *See* JX 8 at 3, 4 and 9. Additionally, although Check Number 725 is dated March 14, 2014, in the “For” line on the bottom left it states “Balance W/E 3/22, 3/29, 4/5.” JX 8 at 11; TR 138-139. Mr. Smith pointed out it would be unusual for one to date a

check for March 14 yet indicate in the “For” line that it was for work for weeks ending 3/22, 3/29 and 4/5, dates that post-dated the date entered on the “date” line at the top right corner of the check. TR 139. Smith believed this check was “what he [Petty] owed us to make it right for those weeks.” TR 139. Mr. Smith said that on the last day of the job he had a “confrontation” with Mr. Petty in which he let Mr. Petty know Petty owed him and Mr. Reid money. TR 142. He testified Mr. Petty’s response was that “money was tight, he didn’t have the money.” *Id.*

Mr. Smith initially testified that the signature on the back of some of the cancelled paychecks he received from Mr. Petty was not his because there was a “dot” and not a “circle” above the “i” in Smith. TR 140-141. On cross examination, Mr. Smith continued to deny his signature appeared on the back of several cancelled paychecks from Mr. Petty’s bank which had been written to him. TR 150; JX 8. Specifically, he denied it was his signature on cancelled paychecks, Nos. 720, 722, 725, and 5164 (JX 8 at 2, 3, 4, 8). TR 150-155. He appeared to acknowledge his signature appeared on check numbers 701, 702, 706, 727.¹⁰ (JX 8 at 1, 5, 6, 9) TR 150-155. Mr. Petty pointed out that most of the cancelled checks, those Smith admitted contained his signature and those he denied included his signature, had the same RI identification number handwritten under the endorsing signature on the check. TR 151-153. Mr. Smith stated he has not had a RI driver’s license for the last four years so the handwritten number under the signature on the cancelled checks was not his RI driver’s license number. TR 153-154. He said he did have a RI identification card, but did not have it in his possession at the hearing, and did not know whether the handwritten number under the signature endorsing the checks, was his RI identification number.¹¹ *Id.*

Mr. Smith acknowledged that on behalf of his union he had engaged in “salting” on non-union construction jobs. TR143-144. Smith explained that when work is slow union members will go out and get hired on non-union jobs, the union members will document everything to a “T”, for example if a health or safety violation were observed the “salting” employee would report it to someone higher in the Union and that person would call OSHA, or if there were wage violations they would be reported to the government. TR 144-146. Smith said the purpose of salting is to get the company to become union. TR 144. He denied he was engaged in “salting” activities on this job.

Mark Shovlin

Mark Shovlin, is president of Pascack Builders, the general contractor. TR 172. Mr. Shovlin testified the construction job at issue was one of his company’s smaller jobs. He noted

¹⁰ Later on re-direct, Mr. Smith appeared to concede the signatures on all of the cancelled checks were his, even those without the tell-tale “circle” above the letter “i” in his last name. TR 161-162. I find Mr. Smith signed each of the checks he received from Mr. Petty.

¹¹ Although Mr. Smith testified he has not had a RI license for the last four years, in his daily log book he recorded the mileage from his residence to each job site. TR 148. He testified he did this so he had the mileage for tax purposes. *Id.* Presumably, if Mr. Smith did not have a driver’s license, he was not driving. How one can appropriately use mileage as a deductible business expense on one’s income taxes, if one is not driving, is puzzling at a minimum and a potential misrepresentation. Smith’s statement that he was keeping the mileage for his co-worker Mr. Reid is not credible.

there were likely seven or eight subcontractors on this job and Tri-State was one of them. TR 171-172. He characterized it as a “kind of start and stop type of project due to project delays and weather delays” and because of the nature of the job, Pascack did not have full-time supervision on site. TR 173. *Id.* An employee of Pascack Builders was responsible for this job and was generally on site for a period of time each day. TR 173. Mr. Shovlin acknowledged the Daily Project Reports (JX 7) prepared by Pascack’s project manager were required to be submitted to the Town of Narragansett. TR 176-177, 180-181. He testified the Daily Project Report was not accurate in terms of being used for any auditing purposes. TR 176. However, he conceded that if the Daily Project Report noted Tri-State employees went home after two hours on a specific day because of weather he would not question its reliability in that regard. TR 177. He also acknowledged the Daily Project Reports noted the number of Tri-State employees working at the site each day, the weather conditions each day and the effective workday by percentage. TR 181-185.¹²

Franklin Petty, Jr.

Franklin (Frank) Petty, Jr. is the owner of Tri-State, a construction contracting company. TR 198. He testified it is a small company usually employing 2-3 individuals on jobs. TR 200. He is the subcontractor on the Multi-Jurisdiction facility under the contract involved herein. Tri-State’s part of the job was to erect the steel siding of the building and the roof and his contract totaled \$35,000. TR 202-203. Mr. Franklin recalled Mr. Smith worked for him on this job from the beginning of the job sometime in March 2014 until the end of April 2014. *Id.* Contrary to Mr. Smith’s testimony, Petty maintained he kept timecards. TR 205. Mr. Petty testified that he wrote the employee’s name at the top of the timecard. *Id.* Because he was not always at the jobsite at the end of each day, at the beginning of the following morning’s shift, he asked the two employees what hours they worked the previous day and he entered the time on the timecard. TR 205-206. Mr. Petty maintained that at the end of the week, he presented each employee with a timecard for that week’s hours and asked each employee to sign the timecard. TR 205-206; 211-212.

Mr. Petty conceded he did not always pay the employees the total amount due each pay period as he was short of cash. TR 208-210. He asserted he had an agreement with Smith and Reid to pay them a portion of what he owed them for hours worked and then pay the balance at a later date when he had the funds. TR 208-211; 215-216. Mr. Petty illustrated this practice using a check he wrote Mr. Smith. Mr. Petty noted JX 8 at 4 cancelled Check Number 725, indicated it was written March 15, 2014, but in the “For” line at the bottom left of the check it states “Balance W/E 3/22, 3/29, 4/5,” and the check was cashed by Smith on April 21, 2014, as shown by the 2 lines printed below the check by the bank when the check was presented for payment. TR 210, 227. Mr. Petty admitted he backdated this check and it was to cover the balance of what he owed Mr. Smith for hours worked the weeks of 3/22, 3/29 and 4/5. TR 210-211.

Mr. Petty’s testimony as to how he handled his payroll on this job was inconsistent. At the start of the job, he stated he was using a payroll program to determine the appropriate

¹² Mr. Shovlin was upset that he was not notified of the Wage and Hour investigation or the request to the Town of Narragansett to withhold monies under the contract, until after Pascack Builders had paid Tri-State virtually all of the funds owed Tri-State. TR 174-176, 186.

withholding for each pay period and writing the checks himself. TR 206-208. However, the check he wrote to Smith on March 14, 2014 (Ck No 701) does not indicate the amount withheld for tax purposes, and it is unclear as to whether this check represents gross or net payment for the week. See JX 8 at 1. Mr. Petty also testified he had a payroll service when he began writing payroll checks on March 14, but initially he did not have any checks from the payroll service so he wrote payroll checks from his business account. He testified the payroll service tracked the withholdings. TR 208. There are only two checks prepared for Mr. Smith by the payroll service: check number 5164 dated April 16, 2014 covering pay period 4/7/14 – 4/13/14, and check number 5166 dated April 25, 2014 covering pay period 4/14/14 – 4/20/14. See JX 8 at 8 and 10. Check number 5164 is the only check which also includes a breakout of amounts withheld from Smith for that pay period. See JX 8 at 7. The information below the check also appears to reflect under the “YTD Amount” column, amounts withheld from Smith for unspecified prior pay periods. JX 8 at 7. However, there is no evidence Mr. Smith was ever provided the withholding amounts for any other check he received from Mr. Petty.

Mr. Petty also admitted that he is missing the certified payroll pages for one week. TR 214-215. The missing pay roll period is for the week ending April 13, 2014. See JX 4. He acknowledged he signed the certified payroll records and acknowledged the Statement of Compliance in which he confirmed he paid all persons employed on this project “the fully weekly wages earned.” TR 219-220. JX 4. However, Mr. Petty concedes even though he signed the Statement of Compliance attesting he paid employees the full weekly wages earned, some weeks he paid the employees only a portion of wages earned. TR 222-226, 228-232, 210-211. He also acknowledged the dates appearing in the “Date” line in the top right hand corner of the checks may not have been the date he actually wrote that check as he may have post-dated checks. TR 235. While he acknowledged his record keeping was problematic, Mr. Petty maintained by the end of the job he caught up and made sure the employees had been paid for all hours worked even if some weeks were paid in several partial checks. TR 234-236.

Mr. Petty testified that on occasion he observed Smith and Reid carpooling together to the jobsite. TR 238-239. Sometimes they came separately. TR 238.

V. DISCUSSION

1. Credibility

I have considered and evaluated the rationality and consistencies of the testimony of the witnesses, including the manner in which the testimony supports or detracts from the other evidence. I have taken into account all relevant, probative and available evidence, while analyzing and assessing its cumulative impact on the record. An administrative law judge is not bound to believe or disbelieve the entirety of a witnesses testimony but may choose to believe only certain portions of testimony.

Moreover, in arriving at a decision, it is well settled that the factfinder is entitled to determine the credibility of witnesses, weigh the evidence, and draw his own inferences therefrom. *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98, 101 (1997); *Administrator v.*

Groberg Trucking, Inc., ALJ No., 01 SCA-22, ARB No. 03-137 (ARB Nov. 30, 2004) *citing Sundex, LTD.*, ARB No. 98-130 (ARB Dec. 30, 1999). I find neither Mr. Petty nor Mr. Smith entirely credible. Mr. Smith testified he always signed his name with a “circle” over the letter “i” in Smith. When confronted with his signature on some cancelled payroll checks Mr. Petty received from his bank and provided the investigator, Mr. Smith asserted the signature on the cancelled check was not his, as the signature did not include his telltale “circle” over the letter “i” in Smith. Likewise Mr. Smith testified he never saw a timecard and never signed a timecard by noting the absence of a “circle” above the “i” in Smith on the signatures on the timecards. However, the signature on one timecard does appear to have a “circle” over the letter “i” in Smith. JX 5 at 5. Recognizing the difficulty this testimony presented both in terms of documenting hours, calculating back wages and demonstrating there were no timecards and he never signed timecards, counsel for the Administrator attempted to rehabilitate Mr. Smith. On re-direct examination, Mr. Smith acknowledged his signature is not always consistent. TR 123-125, 150-157, 161-162. No handwriting expert testimony or opinion was offered. In my lay review of Mr. Smith’s signature as it appears on the cancelled payroll checks, which I find he did sign, with his purported signature on timecards, I cannot find the signature on timecards is not Mr. Smith’s.¹³

However, I do not find Mr. Petty maintained accurate timecards and payroll records. The hours on some timecards were changed and it is unknown whether the changes were entered before or after employees signed. *See* JX 5 at 1, 6, 7. Additionally, as detailed below, the evidence demonstrates there were specific dates Mr. Petty recorded zero hours worked, but Mr. Smith’s daily log recorded he worked various hours on those dates and the Pascack Daily Project Reports for those exact dates establish Tri-State employees were on the job site.¹⁴ Moreover, Mr. Petty acknowledged he did not pay the employees all wages when due and therefore, I find the payroll records are inaccurate.

2. DBA Violations

The Davis-Bacon Act requires employees working on covered contracts to be paid a minimum wage “based on the wages the Secretary of Labor determines to be prevailing for the corresponding class of ironworkers employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed.” 40 U.S.C. § 3142(b). This minimum wage is referred to as the prevailing wage. *Id.*; 29 C.F.R. § 1.3. Here the parties stipulated the prevailing hourly wage to be paid the two ironworkers was \$55.03.

The Administrator, as the party bringing the Order of Reference, has the initial burden of proving that the Tri-State employees performed work on the Multi-Jurisdiction Facility job for

¹³ In other less important respects, Mr. Smith’s testimony was inconsistent. For example, he initially testified he began keeping his hours once he realized this was a prevailing wage job and he was not being paid the correct wage for instances like the hearing. TR 116. Later he stated he keeps his own hours on every job as that is recommended by his Union. TR 116-117. He also stated he immediately cashed the paychecks received from Mr. Petty because he was afraid the check might bounce. TR 130-131. On cross-examination he conceded his practice on every construction job was to cash his checks when he received them. TR 146-147.

¹⁴ As discussed more fully below, I credit Smith’s Daily Log of hours only to the extent the daily log can be corroborated by Pascack’s Daily Project Reports.

which they were not properly compensated. *Cody Zeigler, Inc.*, 1997-DBA-17 (ALJ April 7, 2000), *aff'd in relevant part*, ARB Nos. 01-014 and 01-015 (ARB Dec. 19, 2003); *Trataros Construction Corp.*, WAB Case No. 92-03 (WAB Apr. 28, 1993). The burden then shifts to the employer to come forward with evidence of the precise number of hours worked or to present evidence sufficient to negate “the reasonableness of the inference to be drawn from the employee’s evidence.” *Id.* If the employer fails to carry this burden, then damages may be awarded to an employee, even if the amount of damages is approximate. Where the Department of Labor reconstructs an employer’s payroll, the burden is on the employer to present evidence which is sufficiently precise to contradict the reconstructed payroll. *Pythagoras General Contracting Corp.*, 2005-DBA-14 (ALJ June 4, 2008) *aff'd*, ARB Nos. 08-107 and 09-007 (ARB Feb. 10, 2011) (errata issued Mar. 3, 2011); *Dumarc Corp.*, Case No. 2005-DBA-7 (ALJ, Apr. 27, 2006) (because accurate payroll records were not maintained by employer, and ALJ may properly “rely on the testimony of witnesses to assess and reconstruct hours worked”); *Northeast Energy Services, Inc. (NORESCO)*, Case No. 2000-DBA-3 (ALJ, Feb. 12, 2002).

Upon careful evaluation of all of the evidence including testimony and documents submitted, I find the timecards and certified payroll records are not accurate or reliable. Mr. Petty, owner of Tri-State, admitted he did not pay the two employees the total wages owed when due. He conceded he had cash-flow difficulties and paid the employees only partial wages for several weeks during this contract. Although Mr. Petty maintained he eventually caught up and paid the two employees all wages due, the evidence does not support this assertion. In addition, the evidence supports a finding Tri-State and Mr. Petty did not pay employees for all hours worked.

The hours reflected on time cards and the certified payroll records conflict with the hours Mr. Smith recorded in his daily log and in some important respects with notations in Pascack Daily Project Reports for specific dates. Although Pascack’s Daily Project Reports do not capture the hours worked, and is not complete in all respects, it does provide information that corroborate in part some aspects of Mr. Smith’s daily log and contradicts the timecards and certified payroll records. While the Pascack Daily Project Report does not record hours worked, it does note for each day the number of Tri-State employees on the job site and whether the weather conditions affected the work day requiring employees to stop work early. The following chart is illustrative:

Date	Hours According to Certified Payroll Records	Hours According to John Smith’s Log Book	Pascack Daily Job Report
03/13/14	0 hours	2 hours	2 hours; 3 Tri-State workers present
03/17/14	0 hours	2 hours	2 hours; 3 Tri-State workers present
03/21/14	0 hours	5 hours	3 Tri-State workers present; Effective work day: 100 %
03/27/14	0 hours	8 hours	3 Tri-State workers present

04/18/14	0 hours	8 hours	3 Tri-State workers present: Effective work day: 100 %
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The Chart establishes that for these five days, Mr. Smith was not paid any wages and according to his daily log he worked anywhere from 2 to 8 hours on each of those days, for a total of 25 hours. The Pascack Daily Project Report supports Mr. Smith’s assertion that he was on the job site working on those dates.¹⁵ Mr. Petty failed to provide any explanation for his failure to record any hours worked for either Mr. Smith or Mr. Reid on the specific dates identified when the Pascack Daily Project Reports note Tri-State employees were on the job site on those very dates. I credit Mr. Smith with a total of 25 hours over these dates and Mr. Reid with 17 hours over the same dates.

In addition, the certified payroll records do not show Mr. Smith worked any hours in the week ending April 26, 2014. However, Mr. Smith’s daily log reflects 30 hours worked for the week ending April 26, 2014. JX 6 at 8. Specifically, Smith’s Daily Log notes 8 hours for Monday 4/21; 1 hour for Tuesday, 4/22 but with a notation “no work, rain day,”; 7 hours for Wednesday 4/23; 7 hours for Thursday April 24; and 7 hours for Friday April 25. JX 6 at 8. The Pascack Daily Project Report notes a 100% effective work day for Monday, 4/21; for Tuesday, 4/22 it notes a 100% effective work day; Wednesday 4/23 is noted “cloudy, showers, rain” and “Rain high winds Wed. no building construction,”; Thursday, 4/24 is listed as a 100% effective work day; as is Friday, 4/25. JX 7 at 27-30. Mr. Smith’s log is generally consistent with the Pascack Daily Project Report for the week ending April 26, 2014 indicating Tri-State employees were on site and on one day were interrupted by weather, except that Mr. Smith identified Tuesday, 4/22 as working 1 hour with the notation “no work, rain day.” (JX 6 at 8). Whereas the Pascack’s Daily Project Report notes Wednesday, 4/23 “rain, high winds, no building construction.” JX 7 at 28. Mr. Petty’s testimony that Mr. Smith worked on this project until the end of April, also supports an inference Mr. Smith worked the week ending April 26. TR 202-203.¹⁶ Nevertheless, upon careful consideration of all of the evidence, one can reasonably infer Mr. Smith worked the week ending April 26, 2014 and was paid for zero hours. I find Mr. Smith is entitled to 30 hours worked for the week ending April 26, 2014.

The accuracy of the timecards and certified payroll records is also undermined by the examination of the paychecks given to Mr. Smith. Only one of the payroll checks Mr. Petty

¹⁵ I credit the evidence Mr. Smith and Scott Reid carpooled together most days with the exception of the week ending March 29 when Mr. Reid did not work due to injury. Thus with the exception of March 27, I credit Mr. Reid with the same hours as Smith for a total of 17 hours on the dates outlined in the chart above.

¹⁶ In addition, I note the Pascack Daily Project Reports for the week ending April 26, 2014 record only two Tri-State employees working on site that week. JX 7 at 27-30. For all other weeks, the Pascack Daily Project Reports record three Tri-State employees on site most days with the exception of a few days which record 4 Tri- State employees on site. JX 7 at 1-26. The record provides no explanation for a reduction in the number of Tri-State employees on site the week ending April 26. Curiously, one of the dates the Pascack Daily Project Reports records 4 Tri-State employees on site is March 28, 2014. That is a date Investigator Agudelo and Mr. Smith testified Mr. Reid was off work for an injury, and the timecard Mr. Petty submitted reflects Mr. Reid did not work. JX 7 at 14, TR 57-58, 109-111; JX 5 at 4. From this, I determine there are limits to the inferences that may fairly be drawn from the Pascack Daily Project Reports.

provided match up with the certified payroll records. Check Number 5166 for \$842.27 is included in the certified payroll records. See JX 8 at 10 and JX 4 at 11.¹⁷ None of the other checks Mr. Petty gave to Mr. Smith and provided to the investigator line up with any amounts due detailed in the certified payroll records. Compare JX 4 at 1, 3, 5, 7, 9 with JX 8 at 1 -5, 11, 12, 13. For instance, the payroll record for the week ending March 15, 2014 indicates Mr. Smith was to be paid \$1133.68 in net wages. JX 4 at 3. However, Check No. 722, dated 3/15/14 stating it was for "Balance W/E 3/15" was for the sum of \$269.68, and there is no other check indicating it covered the week ending 3/15/14. See JX 8 at 3.

After careful evaluation of the testimony and many hours reviewing the documentary evidence, I find the timecards and certified payroll records are not reliable or accurate and they underreport the number of hours worked by Mr. Smith and to a lesser degree Mr. Reid. Those records are not consistent with the hours reflected in Smith's Daily Log to the extent the log reflecting hours worked can be supported by Pascack's Daily Job Reports on specific dates identified above.

3. Back Wage Calculations

Investigator Agudelo calculated the back wages owed by using the hours in Mr. Smith's Daily Log and multiplying those hours by the wage rate of \$55.03. Thereafter, her task in attempting to credit Tri-State and Mr. Petty with payments made to Smith, was made difficult because she was unable to determine whether the checks Mr. Smith received were gross or net payments. Mr. Petty did not provide documentation that proper payroll deductions were made for each pay period and each check issued. Ms. Agudelo said for checks Smith received which matched the net amounts reflected on the certified payroll records, she credited Mr. Petty with the gross payment amount listed on that specific payroll record. See TR 49-54; JX 4 at 11 and JX 8 at 10. She also credit Mr. Petty with the gross amount of Check Number 5164 as below that check the payroll deductions are laid out. JX 8 at 7. Thus, Ms. Agudelo credited Mr. Petty and Tri-State with paying Mr. Smith a total of \$8,365.75. I have found Mr. Smith's daily log of hours can be credited in part. That is, to the extent it is corroborated by Pascack Daily Project Reports noting Tri-State employees present on site on dates timecards/payroll records reflect no hours worked. I have determined, Mr. Smith is entitled to 25 hours worked on various dates as shown in the chart above. These dates are corroborated by Pascack Daily Project Reports as days Tri-State employees were on site, and for which Mr. Petty credited Smith zero hours. I have also found Mr. Smith worked 30 hours the week ending April 26, a week in which Pascack's Daily Project Report records two Tri-State employees on site all week, and Mr. Petty recorded no hours for Mr. Smith. In total, I found the evidence established Mr. Smith worked a total of 55 hours for which he was not paid. Multiplying the hours due Smith by the prevailing wage (55 x \$55.03) equals \$3,026.65, the wages due Mr. Smith.

For Mr. Reid, Investigator Agudelo used the same hours Mr. Smith listed in his Daily Log with two exceptions. First, she learned the week before the hearing that Mr. Reid suffered

¹⁷ There was no certified payroll record for the week ending April 13, 2014. See JX 4. However, Check No. 5164 in the net amount of \$1,298.76 paid to Smith appears to cover this pay period.

an injury and did not work any hours the week ending March 29, 2014.¹⁸ TR 57-59. Second, she did not record any hours worked for Mr. Reid the week ending April 26, 2014. JX 10 at 2. There is a notation on the Amended Spreadsheet the investigator prepared for Mr. Reid stating “Scott [Reid] was sick w/e 4/26/14, according to John Smith.”¹⁹ JX 10 at 3. This is the only evidence suggesting Mr. Reid did not work that week. However, other evidence suggests Mr. Reid did work the week ending 4/26. For instance, Mr. Reid received a payroll check, Check No. 5168, reflecting payment of \$1,265.84 net for the week ending 4/26 (JX 9 at 9). On the face of the check it states it was for Pay Period 4/20/2014 – 4/26/2014. The \$1,265.84 figure is also reflected in the payroll records (JX 4 at 12), as net owed for 30 hours work. Investigator Agudelo testified that if she could link the amount of a cancelled check with a payroll record she credited Mr. Petty with that amount. Therefore, I infer Mr. Petty has paid Mr. Reid for hours worked the week ending April 26, 2014. Nevertheless, as discussed above, I found Mr. Reid was not paid for 17 hours he worked on various dates. Multiplying the hours due Mr. Reid by the prevailing wage (17 x \$55.03) demonstrates Mr. Reid is due \$935.51 in unpaid wages. Accordingly, Mr. Petty and Tri-State owe a total of \$3,962.16 in unpaid wages to the two employees.

4. Debarment

Pursuant to 29 C.F.R. 5.12(a)(1), “whenever a contractor or subcontractor is found to be “in aggravated or willful violation of the labor standards provisions of any applicable statutes listed in 29 C.F.R. § 5.1 other than the Davis-Bacon Act, such contractor or subcontractor...shall be ineligible for a period of three years to receive any contracts or subcontract subject to any of the statutes listed in § 5.1. Debarment is intended to be remedial, not punitive.

Debarment is appropriate where a contractor or subcontractor has “disregarded its obligations to employees.” *P&L Fire Protection, Inc.* 1994-DBA-66 (ALJ, May 15, 1997). Before moving to debar an employer, the Administrator must establish that the violations of the Davis-Bacon Related Acts were “aggravated” or “willful.” 29 C.F.R. § 5.12(a)(1). The term “willful” has been held to be synonymous with the terms “voluntary” “deliberate” and “intentional.” *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). The Supreme Court went on to state that “willful” “is widely used in the law, and although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent.” *Id.*; see also *Hugo Reforestation*, ARB No. 97-SCA-20 slip op. at 7 (ARB Apr. 30, 2001). The Department of Labor’s Administrative Review Board has stated the terms “aggravated or willful” do not encompass “merely inadvertent or negligent behavior. Instead, the actions typically found to be ‘aggravated or willful’ seem to meet the literal definition of those terms – intentional, deliberate, knowing violations of the labor standards provisions of the Related Acts.” *A. Vento Constr.*, WAB No. 87 51, slip op. at 7 (Oct.

¹⁸ Mr. Smith’s testimony on this point was consistent as he stated Mr. Reid was injured on the job and did not work the week of March 24. TR 109-110. I have noted the timecards submitted by Mr. Petty for this week also confirm Mr. Reid did not work that week. JX 5 at 4.

¹⁹ No other evidence to support this statement was proffered.

17, 1990) (footnotes omitted). Ignorance is no defense to debarment. *LTG Constr. Co.*, WAB No. 93-15, slip op at 7 (Dec. 30, 1994).

Falsifying certified records supports debarment. *Dumarc Corp.*, Case No. 2005-DBA-7 (ALJ, Apr. 27, 2006); *Abhe & Svoboda, Inc.* ARB Case Nos. 01-063, 01-068, 01-070, ALJ Case Nos. 199-DBA-20 to 27 (ARB July 30, 2004), *recon denied* (ARB Oct. 15, 2004) *aff'd*, *Abhe & Svoboda, Inc. v Chao*, 2006 WL 2474202 (D.D.C. Aug 25, 2006), *aff'd*, 508 F.3d 1052 (D.C. Cir. 2007)(the Board held underpayment of prevailing wages and submission of falsified payrolls that hide the underpayments constitute a willful violation of the DBRA and warrant debarment). I have determined Mr. Petty did not pay the employees for all hours worked. Tri-State is a small company typically employing no more than a handful of employees on each job. Mr. Petty's poor record keeping was a contributing factor to this violation. Nonetheless, his lax record keeping practices demonstrated a disregard for his responsibilities under the regulations and resulted in underpayment of wages to two employees. Moreover, Mr. Petty also falsified payroll records when he failed to pay for all hours when due. He signed certified payroll records reflecting net wages paid to each employee each week, but he admitted he failed to pay both employees the correct wages each pay period because he was short on cash. TR 216. Mr. Petty as the owner of Tri-State and the individual responsible for the payroll was acting as a corporate officer of Tri-State and committed the violations involved herein. Moreover, I find his action in signing the "Statement of Compliance" for each Certified Weekly Payroll confirming he had paid each employee the "full weekly wages earned" when he knew this to be untrue was a deliberate and knowing falsehood. Accordingly, debarment is appropriate and Tri-State and Mr. Petty are debarred for a period not to exceed three years.²⁰

5. Prime Contractor Joint Liability

A prime contractor is responsible for payment of back wages when a subcontractor fails to pay. 29 C.F.R. § 5.5(a)(2); 29 C.F.R. § 5.5(a)(6), *see also Raky Wilson Co.*, ARB Case No. 02-086, 200 DBA-14 (ARB Feb. 27, 2004). I am sympathetic to the position Pascack Builders find itself in in this case. It appears the Wage and Hour Investigator did not ensure someone with authority at Pascack was aware of its investigation, and it did not notify Pascack of the close out interview with Mr. Petty and Tri-State, and the request to the Town of Narragansett to withhold funds occurred after Pascack had paid Tri-State all but a small portion of funds due under the contract. Nevertheless, it is clear Pascack was the prime contractor on the Narragansett project and it subcontracted with Tri-State. *Jt. Pre-trial Stips*. Pascack had a contract with the Town of Narragansett for construction services on a Multi-Jurisdictional Port Facility. *Id.* Pascack and Tri-State entered into a contract on or about December 13, 2013 for construction services on this facility. *Id.* The contract between the two companies references the prevailing wage and fringe benefit rate for ironworkers and notes the subcontractor's agreement to comply with the wage determination or other applicable labor standards. *Id.* Pascack and Tri-State are liable for back wages to the two employees in the total amount of \$3,962.16.

²⁰ The regulation at 29 C.F.R. 5.12(c) provides "[a]ny person or firm debarred under 5.12(a)(1) may in writing request removal from the debarment list after six months from the date of publication by the Comptroller General of such person or firm's name on the ineligible list."

VI. CONCLUSION

Based on the foregoing, I find Respondents Tri-State Building Co. and Mr. Frank Petty Jr. violated the DBRA by failing to pay two ironworkers, John Smith and Scott Reid, for all hours worked and failed to pay the prevailing wage. Pascack, Tri-State and Mr. Petty owe a total of \$3,962.16 to the two employees. Because the DBRA violations are found to be willful, Tri-State Building Co. and Frank Petty, Jr, are debarred for a period of no more than three years.

VII. ORDER

1. Respondents Tri-State Building Co. and Frank Petty, Jr. are liable for the payment of back wages to Mr. Smith in the amount of \$3,026.65, and to Mr. Reid in the amount of \$935.51.
2. Respondent Pascack Builders, as the prime contractor, is jointly and severally liable for payment of back wage amounts to employees of its subcontractor, Tri-State Building Co., as specified herein in the total amount of \$3,962.16.
3. The funds presently held by the City of Narragansett, RI as the contracting agency for construction of the Multi-Jurisdictional Port facility, shall to the extent of the Respondents' liability, as found herein, be released to the United States Department of Labor, to be distributed by the Department to the specified employees.
4. Respondents Tri-State Building Co. and Frank Petty Jr., shall be debarred under 5 C.F.R. § 5.12(a)(1) of the regulations for a willful violation of the Davis Bacon and Related Acts, for a period not to exceed three years and for that period shall be ineligible to receive any contract or subcontract subject to any of the statutes listed in 29 C.F.R. Part 5.

SO ORDERED.

COLLEEN A. GERAGHTY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) that is received by the Administrative Review Board (“Board”) within forty (40) days of the date of issuance of the administrative law judge’s decision. *See* 29 C.F.R. § 6.34. The Petition must refer to the specific findings of fact, conclusions of law, or order at issue. *See* 29 C.F.R. § 6.34.

The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party’s legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within

such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

When a Petition is timely filed with the Board, the administrative law judge's decision is inoperative until the Board either (1) declines to review the administrative law judge's decision, or (2) issues an order affirming the decision. *See* 29 C.F.R. § 6.33(b)(1).

At the time you file the Petition with the Board, you must serve it on the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. *See* 29 C.F.R. § 6.34.