New Jersey Department of Labor and Workforce Development, **Petitioner,** **v.** **The Grace Brothers, James T. Grace and Jethro Grace, Jr.,** **Respondents.** **OAL DKT. NOS. LID 06843-12 & LID 06844-12** **AGENCY DKT. NO. PC-214-0310-ROM (CONSOLIDATED)**	**DEPARTMENT OF LABOR and WORKFORCE DEVELOPMENT** **FINAL ADMINISTRATIVE ACTION of the COMMISSIONER** **Issued: 1/9/14**

The New Jersey Department of Labor and Workforce Development (the Department) served two separate notices upon The Grace Brothers and its principals (Grace Brothers or respondents):

(1) A notice, dated April 23, 2012, served upon Grace Brothers and James T. Grace, Owner and Individually, finding violations of (a) N.J.S.A. 34:11-56.27, for failure to pay the prevailing wage on public works as required under the Prevailing Wage Act (PWA), N.J.S.A. 34:11-56.25 et seq., (b) N.J.S.A. 34:11-4.2, for unpaid wages/late payment of wages, and (c) N.J.S.A. 34:11-56.29, for failure to keep an accurate certified payroll record. The notice indicates that the project upon which these violations occurred was the construction of condominiums at 137 High Street in Mount Holly, New Jersey, which was undertaken in connection with financial assistance through the Urban Enterprise Zone program (UEZ program).[1] On the basis of the violations listed above, the Department sought the collection of wages in the amount of $139,108.42, an administrative fee in the amount of $13,910.84, and penalties in the amount of $270,000. Included within the notice is a document entitled, "Wages Due Form," which lists ten individual employees of Grace Brothers to whom wages were determined due. Those individuals and the wages listed as due to each follow: Omar Dehaney ($13,507.08), John Dunbar ($19,427.23), Janall Johnson ($26,442.00), Steven Luke ($10,379.47), Kevin Mathis ($12,645.04), Keith Murray ($21,153.60), James Rich ($7,605.63), Gordon Robinson ($2,693.61), Jacob Simmons ($11,747.68) and Jermel Vaughan ($13,507.08);

(2) A notice, dated April 23, 2012, served upon Grace Brothers, James T. Grace,

[1] During the hearing before the Administrative Law Judge, the parties stipulated that the UEZ program financial assistance which enabled construction at 137 High Street triggered the statutory prevailing wage obligation. (Hearing Transcript, September 20, 2012, page 10, lines 1 through 7)

Owner and Individually, and Jethro Grace, Jr., Owner and Individually, seeking debarment of each on the basis of the same violations as listed above.

Respondents requested a hearing with regard to both the debarment and the assessment for wages, an administrative fee and penalties. The matters were transmitted to the Office of Administrative Law (OAL), where they were consolidated for hearing before Administrative Law Judge (ALJ) Elia A. Pelios.

Following the hearing, the ALJ concluded that sufficient evidence had been presented to substantiate the charges brought against respondents by the Department relative to six of the ten employees listed on the earlier mentioned "Wages Due Form." That is, the ALJ concluded that the Department had presented sufficient evidence to establish that respondents, (1) had failed to pay the prevailing wage in violation of N.J.S.A. 34:11-56.27, (2) had failed to pay the full amount of wages due in violation of N.J.S.A. 34:11-4.2, and (3) had failed to keep an accurate certified payroll record in violation of N.J.S.A. 34:11-56.29, relative to the following six employees of respondents: Kevin Mathis, Seven Luke, Omar Dehaney, John Dunbar, Jermel Vaughan and James Rich.[2] The ALJ based this conclusion in large part upon his finding that Raymond Smid, Hearing and Review Officer for the Department's Division of Wage and Hour Compliance, and each of the six above-listed employees had testified credibly that respondents paid the six employees less than the statutorily required prevailing wage rate.[3] Because the ALJ found that the six employees had, in fact, been paid less than the prevailing wage rate, he also found that the certified payroll records of respondents, which indicated that the six employees had been paid the prevailing wage rate, were inaccurate. Among the other evidence relied upon by the ALJ in support of his conclusion that the six employees had not been paid the statutory prevailing wage rate, were letters dated October 19, 2009, signed by Deborah Scott, respondents' manager for the project at 137 High Street, stating that, (1) Kevin Mathis had been employed by respondents as a carpenter, had been working approximately 40 hours per week and had been paid a rate of 25 dollars per hour; (2) Jermel Vaughan had been employed by respondents as a carpenter, had been working approximately 40 hour per week and had been paid a rate of 13 dollars per hour; and (3) John Dunbar had been employed by respondents as a carpenter and had

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[2] The ALJ lists these six individuals and the wages owed each on page 12 of his Initial Decision within his discussion of wages due. Based on these names and corresponding wages due (taken from the "Wages Due Form"), he concludes that there are $77,071.53 in "underpaid wages which must be paid by respondents." On the previous page of the Initial Decision, when totaling the number of potential violations committed by respondents for the purpose of laying a foundation for the later discussion of penalty, the ALJ states that respondents had "committed three violations under N.J.A.C. 12:60-8.2 for seven employees over twelve weeks" (emphasis added), concluding, therefore, that "respondents have committed two hundred and fifty two (252) violations of the Act." I attribute this inconsistency (between the ALJ's list of six employees to whom wages are due and his remark that respondents have committed three violations "for seven employees" over twelve weeks) to the additional testimony of Grace employee, Anthony Tate. Mr. Tate is not listed on the "Wages Due Form," which is the basis for the wages, administrative fee, penalties and debarment sought by the Department. Furthermore, the Department did not present a packet of documentary evidence in support of wages due Mr. Tate, as it had for Mathis (P-4), Luke (P-14), Dehaney (P-7), Dunbar (P-6), Vaughan (P-5), and Rich (P-9). Presumably this is why the ALJ did not include Mr. Tate among the individuals listed on page 12 of the Initial Decision and why no wages due Mr. Tate are included in the $77,071.53 calculated by the ALJ.

[3] The following four employees who had been listed on the "Wages Due Form," did not testify: Janall Johnson, Keith Murray, Gordon Robinson, and Jacob Simmons.

been working approximately 40 hours per week.[4] Ms. Scott conceded during her testimony that she had written the letters for Mathis, Vaughan and Dunbar. She stated, however, that the letters had been prepared at the request of those employees and that the employees had asked that the letters misstate their hours worked and rates of pay. She indicated that she had provided the letters as a favor to the men, adding that the true hours worked and rates of pay for each of the men, including Mathis, Vaughan and Dunbar, were reflected in the certified payroll records.

With regard to the inconsistencies between the employees' version of events (that is, their hours worked – approximately 40 per week – and their rates of pay – 25, and between 13 and 15 dollars per hour, respectively) and Ms. Scott's account (that the six employees had worked far less than 40 hours per week and had been paid the prevailing wage rate, as reflected in the certified payroll records), the ALJ found the following:

> Mathis, Steven Luke, Omar Dehaney, John Dunbar, Jermel Vaughan, James Rich and Anthony Tate all testified that they worked approximately eight hours per day; that they worked five days a week for a work week of forty hours; that they were paid thirteen to fifteen dollars per hour (twenty-five in the case of Mathis) and that their actual hours worked and their pay stubs issued with their paychecks were inconsistent with the hours worked and paystubs reflected in the certified payroll presented to the Department of Labor. Deborah Scott denies creating a separate payroll and states that the information contained in the certified payroll is complete and accurate. Neither story is particularly outrageous or inherently unbelievable on its face.
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> However, if Scott's testimony is to be believed, it is to accept her testimony that she provided falsified documents which did not reflect accurate hours of work on a numerous occasions as a favor to the members of the crew for them to present to government agencies and lending institutions for the purpose of obtaining credit or government benefits. To accept her version of fact is to find by her words that she has committed the exact sort of action of which she is accused, just not in the particular instance for which charges were brought. Additionally, to accept her version would mean to determine that seven witnesses conspired to falsely accuse Grace, created their own paystubs, testified under oath, and had the full intention of doing so at the outset of their employment in asking for false documentation of their forty hour work week ostensibly for assistance with mortgage and government benefits requests, while planning to use those documents to support a false claim of denial of wages. This involves so many moving parts that it appears far more likely that the workers did not know it was a public works project, were offered and accepted a lower wage, were regularly not given pay stubs with their checks, filed a claim when they realized the truth and that Grace

[4] Kevin Mathis had testified that he worked approximately 40 hours per week at a rate of 25 dollars per hour and each of the other five employees testified that he had worked approximately 40 hours per week at a rate of between 13 and 15 dollars per hour, whereas respondents' certified payroll records indicated that each had worked fewer than 40 hours per week and that each had been paid approximately the prevailing wage rate, which in each instance is in excess of 25 and 13/15 dollars per hour, respectively.

manufactured a payroll after the fact to make the numbers match.

> Scott's admission to her propensity to commit the acts of which she is accused, considered together with her testimony that despite the tight timeframe Grace was under to complete the project they expected so few hours worked ultimately proves fatal to her credibility, and renders it more likely than not, upon preponderance of the credible evidence, that Smid's theory is correct.[5]

Based on the foregoing, the ALJ concluded that respondents should be debarred for a period of one year and pay to the Commissioner of the Department of Labor and Workforce Development wages owed in the amount of $77,071.53, an administrative fee of $7,707.15 and penalties in the amount of $252,000. The ALJ explained that he had based the period of debarment on his application of the factors set forth at N.J.A.C. 12:60-7.3; that he had calculated the amount of wages owed by adding together the amounts listed on the "Wages Due Form" for Kevin Mathis ($12,645.04), Steven Luke ($10,379.47), Omar Dehaney ($13,507.08), John Dunbar ($19,427.23), Jermel Vaghan ($13,507.08) and James Rich ($7,605.63); that he had calculated the administrative fee, pursuant to N.J.A.C. 12:60-8.4, as 10 percent of the wages due; and that he had determined the appropriate penalty, applying the factors set forth at N.J.A.C. 12:60-8.3(c), to be $1,000 for each of 252 violations of the Act.[6] Exceptions to the Initial Decision were filed by both petitioner and respondents. Petitioner then filed a response to respondents' exceptions. Respondents then filed a reply.

In its exceptions, petitioner agrees with the findings and conclusions of the ALJ, however respectfully requests that the period of debarment be changed to three years. Petitioner explains that, "the applicable statute and regulations do not provide for a one year period of debarment," adding, "the minimum permitted period of debarment is three years."[7] Petitioner concludes,

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[5] "Smid's theory," as explained by the ALJ in his Initial Decision, is that respondents manufactured a certified payroll, modifying the hours worked to a lower number than actually worked so that when one divides the weekly pay received by the employees by the manufactured hours worked, the calculation will yield a number very close to the prevailing wage rate, rather than the lower rate actually paid.

[6] As indicated in an earlier footnote, the ALJ apparently calculated the 252 violations by multiplying seven (number of employees), by 12 (number of weeks), by three (number of violations). As is also mentioned in the earlier footnote and as is clear from the foregoing discussion of the case, the correct number of employees to use in this calculation would appear to be six, not seven. Furthermore, N.J.S.A. 34:11-4.10 states that the maximum penalty which may be assessed for a first violation of N.J.S.A. 34:11-4.2 is $250, whereas for a first violation of N.J.S.A. 34:11-56.27 and 56.29, the Department may assess a penalty of up to $2,500. This is why, for example, the penalty imposed by the Department through its April 23, 2012 notice of violation and attached assessment form (P-3) is $30,000 for violations of N.J.S.A. 34:11-4.2 ($250x10 employesx12 weeks), whereas the penalty imposed by the Department for violations of N.J.S.A. 34:11-56.27 is $120,000 ($1,000x10 employeesx12 weeks). Consequently, arriving at the total amount of penalty, as did the ALJ, by simply multiplying the total number of violations (including violations of N.J.S.A. 34:11-4.2) by $1,000, is inconsistent with the statute and, therefore, is incorrect. These deficiencies in the ALJ's calculation of penalty will be corrected later in this decision.

[7] N.J.S.A. 34:11-56.38 states in pertinent part that no contract shall be awarded to a debarred contractor or to any firm, corporation or partnership in which the debarred contractor has an interest until three years have elapsed from the date of debarment. The factors set forth at N.J.A.C. 12:60-7.3(c), to which the ALJ refers, are for use by the Commissioner in determining whether to exercise his discretion to debar a contractor. Utilizing those factors,

"[t]he opinion of ALJ Pelios is clear in that the ALJ intended the Grace Brothers to be debarred as part of the sanction against them," adding, "[t]herefore, it is respectfully requested that the period of debarment in this matter be adjusted to three years in line with the statute and regulations."

The essence of respondents' exceptions is that, (1) James T. Grace should be dismissed from this matter, since he "only has a passive ownership interest in Grace Brothers," and, therefore, does not fall within the definition of "employer" found at N.J.S.A. 34:11-4.1; and (2) the ALJ's credibility determinations were, for a variety of reasons, flawed and since Scott testified credibly, whereas Smid, Mathis, Luke, Dehaney, Dunbar Vaughan, Rich and Tate were not credible witnesses, and since the documentary evidence relied upon by the Department was "discredited" during the hearing, petitioner "failed to prove by a preponderance of the evidence that the claimants in this case were not paid prevailing wages." Therefore, respondents conclude, all charges against respondents should be dismissed.

In petitioner's response to the first of respondents' exceptions (regarding the liability of James T. Grace), it asserts that by respondents' own account James T. Grace is a partner in Grace Brothers. Petitioner states that this makes James T. Grace an officer of the company which employed the individuals in question, which under N.J.S.A. 34:11-4.1 and N.J.A.C. 12:56-2.1, makes him an "employer" liable for unpaid wages and any fees, penalties or debarment stemming therefrom. Petitioner also maintains that because respondents did not make any effort to have any of the respondents dismissed from the matter at any time prior to the filing of exceptions (that is, no motions were filed prior to or during the hearing, nor were arguments made during conferences or during the hearing), respondents are foreclosed from seeking to have James T. Grace dismissed from the matter through an exception filed with the Commissioner to the Initial Decision of the ALJ. In response to the remainder of respondents' exceptions (each relating primarily if not exclusively to the credibility of witnesses), petitioner states the following:

> The credibility determination of one who has had the opportunity to hear the witness is entitled to deference, Logan v. Bd. Of Review, 299 N.J. Super 346, 348 (App. Div. 1997), unless the credibility findings were arbitrary or not based on sufficient credible evidence in the record as a whole. Cavalieri v. Bd. of Trs. PERS, 527, 537 (App. Div. 2004).
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> The ALJ specifically stated what his credibility findings were and the reasons therefore [sic]. These cannot be reasonably argued to be arbitrary, and respondents' only attempts at arguing that the ALJ made a factual mistake are based solely upon the testimony of Deborah Scott, who was found not to be a credible witness.

In reply, respondents reiterate that James T. Grace is not an officer of Grace Brothers and, therefore, is not liable for unpaid wages and the administrative fee, penalties and debarment stemming therefrom. Respondents also assert that they are not foreclosed from seeking the

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the decision to debar is an "all or nothing" proposition. The Commissioner may either debar for three years, pursuant to the afore-cited statute, or may decide not to debar.

dismissal of charges against James T. Grace through an exception to the Initial Decision of the ALJ. Respondents also, again, argue flaws in the ALJ's credibility findings and attack petitioner's defense of those credibility findings.

CONCLUSION

An agency head need not defer to the findings of an ALJ. In re Kallen, 92 N.J. 14, 20 (1983). Indeed, he need not adopt any of the findings reached by an ALJ in his Initial Decision. Application of the County of Bergen, 268 N.J. Super. 403, 414 (App. Div. 1993). However, the agency head may not ignore an ALJ's abundantly supported conclusions. P.F. v. New Jersey Division of Disability, 139 N.J. 522, 530 (1995); Department of Health v. Tegnaxzian, 194 N.J. Super. 435, 450 (App. Div. 1984). Rather, where there is substantial evidence on all sides of the issues addressed, no findings made or conclusions reached that are based on that evidence and are otherwise within the ALJ's discretionary authority will be seen to be arbitrary, capricious or unreasonable. Application of the County of Bergen, supra, at 411; Application of N.J. Bell Telephone Co., 219 N.J. Super. 77, 89 (App. Div. 1996).

In the present case, the ALJ has produced a thorough and convincing decision wherein the credibility of each witness and the nature and quality of the evidence presented at the OAL hearing was carefully weighed. I will, therefore, accord to the ALJ the deference due him as the trier of fact and the person who directly observed the witnesses, their demeanor and deportment, as well as the quality of their individual testimony and evidence produced in support of their testimony. In addition, having considered the entire case record and the ALJ's Initial Decision, as well as having considered the exceptions filed to the ALJ's Initial Decision and petitioner's response to respondents' exceptions as well as respondents' reply, and having conducted an independent evaluation of the record, I have accepted and adopted the findings of fact, conclusion and recommendation of the ALJ with the exception of the following:

(1) Under N.J.S.A. 34:11-56.38, debarment may only be for a period of three years. Consequently, imposing a debarment of one year, as recommended by the ALJ, is not appropriate. I agree with the ALJ that sufficient evidence has been submitted by petitioner to substantiate the penalty of debarment. Therefore, I will herein order debarment of respondents for the statutorily required period of three years.

(2) The appropriate amount of penalties should not be $252,000, as recommended by the ALJ, but rather, should be $162,000. That is, the ALJ's observation that there had been 252 violations of the Act and that $1,000 penalty should be imposed for each such violation, is not supported by the record or the law. Instead, the record indicates that there were 72 violations of N.J.S.A. 34:11-4.2 (six employees/12 weeks), which should result in a penalty of $18,000 ($250x72); that there were 72 violations of N.J.S.A. 34:11-56.27 (six employees/12 weeks), which should result in a penalty of $72,000 ($1,000x72); and that there were 72 violations of N.J.S.A. 34:11-56.29 (six employees/12 weeks), which should result in a penalty of $72,000 ($1,000x72), for a total penalty assessment of $162,000.

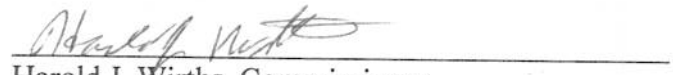
Furthermore, I find respondents' argument in favor of dismissing all charges against James T. Grace to be unconvincing. Instead, I agree with petitioner that James T. Grace is an officer of Grace Brothers and, therefore, is responsible under the law for the failure of Grace Brothers to pay its employees the prevailing wage.

ORDER

Therefore, it is ordered that respondents pay to the Department of Labor and Workforce Development $77,071.53 for wages owed, plus $7,707.15 in an administrative fee and $162,000.00 in penalties.[8] It is also ordered that The Grace Brothers, James T. Grace and Jethro Grace, Jr., be placed on the debarment list pursuant to N.J.S.A. 34:11-56.37.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE COMMISSIONER,
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT



Harold J. Wirths, Commissioner
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[8] Since the April 23, 2012 notice of violation and attached assessment form seeking the payment of unpaid wages, an administrative fee and penalties, is addressed to "James T. Grace, Owner and Individually, and The Grace Brothers," whereas the April 23, 2012 notice of debarment is addressed to "James T. Grace, Owner and Individually; and Jethro Grace, Jr., Owner and Individually; and The Grace Brothers," the order for payment of unpaid wages, an administrative fee and penalties is enforceable only against James T. Grace, Owner and Individually, and The Grace Brothers (not Jethro Grace, Jr.), whereas the order of debarment applies to James T. Grace, Jethro Grace, Jr., and The Grace Brothers.