

CITY AND COUNTY OF SAN FRANCISCO

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FACSIMILE MESSAGE
December 13, 2004

TO:	OF:	PHONE:	FAX:
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Sheryl Bregman Deputy City Attorney, Counsel to OLSE/DPW	Construction Team, San Francisco City Attorney's Office	415-554-4226	415-255-0733
cc: Donna Levitt	Office of Labor Standards Enforcement, City and County of San Francisco	415-554-6239	415-554-6291

FROM:	OF:	PHONE:	FAX:
Marie Corlett Blits, Deputy City Attorney, Counsel to the Hearing Officer	Government Team, San Francisco City Attorney's Office	415-554-4651	415-554-4747

MESSAGE

Re: MH Construction Management Co.'s Request for Administrative Hearing Pursuant to San Francisco Administrative Code Section 6.22(E)(8)(c), Concerning a Determination and Assessment of Back Wages and Penalties by the City and County of San Francisco Office of Labor Standards Enforcement (Specification No. 0723J - Parkside Square Playground)

Please see the attached Hearing Officer's Decision Following 11/8/2004 Hearing, In the Matter of OLSE/DPW and MH Construction Management Company, Inc. Thank you.

We are transmitting a total of 6 pages, including this cover sheet. If you did not receive all of the pages or there is another problem, please call me or Secretary Van Pittsenbarger at (415) 554-4687.

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CITY AND COUNTY OF SAN FRANCISCO

HEARING OFFICER ADMINISTRATIVE HEARING

IN THE MATTER OF:

OFFICE OF LABOR STANDARDS
ENFORCEMENT AND DEPARTMENT
OF PUBLIC WORKS, CITY AND
COUNTY OF SAN FRANCISCO,

AND

MH CONSTRUCTION.
MANAGEMENT COMPANY, INC.

OFFICE OF LABOR STANDARDS
ENFORCEMENT AND DEPARTMENT OF
PUBLIC WORKS DETERMINATION OF
OF FORFEITURE AND PENALTIES FOR
NON-COMPLIANCE WITH WAGE
PROVISIONS, CONTRACT 0723J,
"PARKSIDE SQUARE PLAYGROUND"
[San Francisco Administrative Code §§6.20 et seq.]

**HEARING OFFICER'S DECISION,
FOLLOWING NOVEMBER 8, 2004 HEARING**

INTRODUCTION

This matter came on for hearing by the undersigned Hearing Officer on November 8, 2004 in San Francisco City Hall Room 400, at 9:30 a.m. Attorney Alexander Bannon of McInerney & Dillon, and Matthew Huey, appeared for MH Construction Company. Deputy City Attorney Sheryl Bregman of the San Francisco City Attorney's Office Construction Team, and Donna Levitt, appeared for the City's Office of Labor Standards Enforcement (OLSE) and Department of Public Works (DPW).

The issue before the Hearing Officer this date was the timeliness of MH Management Company's request for an appeal hearing. (San Francisco Administrative Code §6.22(E)(8).) In pre-hearing filings OLSE/DPW argued that the request for hearing was untimely, and MH Management Company argued that it was timely.

Sworn witness testimony and documentary evidence was presented by each party: OLSE Manager Donna Levitt testified and was cross-examined, and MH Construction President Matthew Huey testified and was cross-examined. The Hearing Officer also asked questions of the parties. Argument was presented by both parties, and the matter was taken under submission.

//

FINDINGS

1
2 Having fully considered the evidence presented and the arguments of the parties, the
3 Hearing Officer finds as follows:

4 1. A DPW/OLSE notice of back wages and penalties due, together with an OLSE Final
5 Determination and a copy of Administrative Section 6.22 (OLSE/DPW Exh. 1), was mailed to
6 Matthew Huey of MH Construction Management Company, Inc. on August 24, 2004, based on
7 noncompliance with prevailing wage provisions under Contract 0723J Parkside Square
8 Playground. Mr. Huey acknowledged receipt of this mailing within two-three days. (San
9 Francisco Administrative Code §6.22(E)(8)(b); OLSE/DPW Exh. 1; testimony of Donna Levitt;
10 testimony of Matthew Huey.)

11 2. The August 24th Notice also informed Mathew Huey and MH Construction that if they
12 disagreed with the assessment or determinations, they had 15 days from the date of that
13 document to submit a written request for an appeal hearing to the City Administrator.
14 (OLSE/DPW Exh. 1; testimony of Donna Levitt; testimony of Matthew Huey.)

15 3. San Francisco Administrative Code §6.22(E)(8)(c) provides: "If the contractor or
16 subcontractor disagrees with the forfeiture as so provided in [§6.22(E)(b)], then *within fifteen*
17 *working days of the date of the notification . . . the contractor or subcontractor may request a*
18 *hearing before the City Administrator.*" (Emphasis added.) The Administrative Code does not
19 contain exceptions or provisions for extensions of this time limitation.

20 4. MH Construction Management Company (MHCM) President Matthew Huey
21 submitted a written request for an appeal hearing to the City Administrator dated September
22 27, 2004. (MHCM Exh. A; testimony of Matthew Huey.)

23 5. Fifteen working days from August 24, 2004 was September 15, 2004. The written
24 appeal dated September 27, 2004 (MHCM Exh. A) was 12 days late, and untimely under
25 Administrative Code §6.22(E)(8)(c).

26 6. MH Construction counsel Brannon argued at the hearing that the 15 working days
27 provided by Administrative Code §6.22(E)(8)(c) should be extended by five days for mailing, as

1 provided by the California Code of Civil Procedure (CCP). OLSE/DPW counsel argued that
 2 the CCP extension of time for mailing provisions do not apply to San Francisco Administrative
 3 Code §6.22(E)(8), and the Hearing Officer agrees with that analysis. Further, even if the five
 4 day extension applied, the September 27th filing was still a week beyond the statutory time for
 5 requesting an appeal hearing and untimely.

6 7. MH Construction President Matthew Huey's September 27th letter to the City
 7 Administrator requesting an appeal hearing stated:

8 "We received a letter . . . that funds will be assessed from our contract . . .
 9 and we called Ms. Donna Levitt to ask her to re-evaluate the situation and
 10 she offered to look into the matter. Ms. Levitt responded at the end of the
 11 week of September 1, 2004, and indicated that there is no recourse to the
 12 assessment and we can appeal. I did not get the information about the
 13 appeal until I came back from my trip during the week of September 13,
 14 2004. I call you in reference to the issue and waited for your response
 15 (out of town). I was notified by you on September 24, 2004 to response to
 16 the missed appeal time frame." (MHCM Exh. A.)

17 A. Mr. Huey first testified at the hearing that he thinks he spoke with Donna Levitt on
 18 September 13, that he telephoned and left an oral message for the City
 19 Administrator sometime after that, that he thinks he left the message for the City
 20 Administrator on or before September 15th, and that he thinks this message to the
 21 City Administrator included an oral request for an appeal hearing. He later testified
 22 in the hearing that he thinks he telephoned both Donna Levitt and Bill Lee on
 23 September 14th.

24 B. OLSE Manager Donna Levitt testified at the hearing that she had orally reminded
 25 Mr. Huey of the 15 day time frame for appeal: (1) when he first telephoned her a few
 26 days after receiving the August 24th Notice package; and (2) again when she left a
 27 message with his associate Ms. Chitty Chu (in Mr. Huey's absence) approximately
 28 ten days later (still within the 15 day appeal period¹) confirming that MH Construction

26 ¹ MHCM counsel Bannon stipulated at the hearing that Ms. Levitt's call to Mr. Huey's associate
 27 Ms. Chitty Chu was within the 15 day appeal period.

1 as the entity contracting with the City is responsible for its subcontractors who are
 2 not contracting with the City; and (3) again when Mr. Huey telephoned her after the
 3 15 period had expired (and Mr. Huey responded to her statement that the 15 day
 4 appeal period had expired by saying that he was sure the City Administrator would
 5 still allow a hearing). OLSE/DPW counsel Bregman said that the November 8th
 6 hearing was the first time Mr. Huey asserted to them that the message he left for the
 7 City Administrator included a request for hearing.

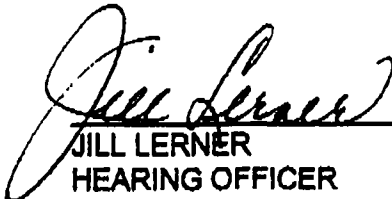
8 C. Based on evidence presented at the November 8th hearing, the Hearing Officer finds
 9 insufficient credible evidence to support MH Construction's claim that it made a
 10 timely oral request (*i.e.*, on or before September 15, 2004) to the City Administrator
 11 for an appeal hearing.

12
 13 **CONCLUSION**

14 8. Based on the totality of the evidence, the Hearing Officer concludes that MH
 15 Construction Management Company, Inc. did not timely request an appeal hearing pursuant to
 16 San Francisco Administrative Code §6.22(E)(8)(c), and therefore no appeal hearing will be
 17 held.

18
 19
 20 **SO ORDERED.**

21 Dated: December 13, 2004

22
 23 
 24 JILL LERNER
 HEARING OFFICER

PROOF OF SERVICE

I, VAN PITTSENBARGAR, 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 December 13, 2004, I served the attached:

Hearing Officer's Decision Following 11/8/2004 Hearing, In the Matter of OLSE/DPW and MH Construction Management Company, Inc.

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

Alexander Bannon, Esq.
Quinlan S. Tom, Esq.
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Sheryl Bregman, Deputy City Attorney,
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Counsel to M. H. Construction

Counsel to OLSE

Donna Levitt, Division Manager
Office of Labor Standards Enforcement
City Hall, Room 430
1 Dr Carlton B Goodlett Place
San Francisco, CA 94102
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, Room 325, 1 Dr. Carlton B. Goodlett Place, 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 FACSIMILE: I caused a copy(ies) of cover letter without the enclosures 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.

Executed December 13, 2004, at San Francisco, California.

Van Pittsenbargar
VAN PITTSENBARGAR