

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL
PUBLIC WORKS CASE NO. 2019-015
1000 SOUTH FREMONT AVENUE TENANT IMPROVEMENTS
COUNTY OF LOS ANGELES

I. INTRODUCTION

On November 9, 2020, the Director of the Department of Industrial Relations (Department) issued a public works coverage determination (Determination) finding that tenant improvement work at Building A-9 of 1000 South Fremont Avenue in Alhambra, California performed for the County of Los Angeles is public work subject to California prevailing wage requirements.

On December 15, 2020, Elite-TRC Alhambra Community LLC (Elite) filed an appeal of the Determination (Appeal) under Labor Code section 1773.5¹ and California Code of Regulations, title 8, section 16002.5. All interested parties were thereafter given an opportunity to provide legal argument and any additional supporting evidence. Elite subsequently filed submissions, including declarations in support of the Appeal, to which subcontractor G Brothers, Inc. joined. The Division of Labor Standards Enforcement (DLSE) filed an opposition. Elite filed a reply.

The Director has sole discretion to decide whether to hold a hearing. (Cal. Code Regs., tit. 8, § 16002.5, subd. (b).) Because the material facts are not in dispute and the issues raised on appeal are solely legal, a hearing is unnecessary.

¹ Unless otherwise indicated, all further statutory references are to the California Labor Code.

All of the submissions have been reviewed in detail and given careful consideration. For the reasons set forth in the Determination, which is incorporated into this Decision on Administrative Appeal (Decision on Appeal), and for the additional reasons set forth and discussed in detail below, the Appeal is denied and the Determination is affirmed.

II. RELEVANT FACTS AND CONTENTIONS ON APPEAL

The facts set forth in the Determination are largely undisputed, and to that extent, they are incorporated herein by reference.² Because Elite alleges certain facts for the first time on appeal, a brief recitation of the factual background is provided here.

The County entered into Lease No. 78546 (Lease) with the owner (now identified as Elite)³ of Building A-9 of the mixed-use campus located at 1000 South Fremont Avenue in Alhambra, California (also known as “The Alhambra”). Building A-9 is part of The Alhambra, which is a mixed-use office campus that purportedly sits on a single parcel. The Alhambra’s buildings total 923,290 square feet of “rentable space,” but Elite has not disclosed how much of this space is being leased to public entities.

In addition to the Lease, the County had other existing leases with Elite for space in Building A-9. Taking into account all its leases, the County leased a total of 271,662 square feet in Building A-9. Elite has not disclosed the exact square footage available at Building A-9. The Lease obligated Elite to complete tenant improvements at Building A-9 and it was agreed that tenant improvement “allowances” could be applied to the cost

² Although Elite alleged additional facts that were not previously provided to the Department and therefore not considered in the Determination, none of those supplemental facts alter the conclusion, as discussed below. Furthermore, Elite should have presented those facts and its arguments when the Department sent out its request for information to the parties. (See Cal. Code Regs., tit. 8, § 16001, subd. (a)(3).) But Elite ignored the Department’s requests and neither Elite nor its predecessor participated in any aspect of the coverage determination process until it filed its appeal.

³ The owner (also the appellant) has now self-identified as Elite, as the predecessor to the prior landlord, The Alhambra Office Community, LLC. Elite states that The Ratkovich Company manages The Alhambra. Unless otherwise specified, this Decision on Appeal will refer to owner and management company collectively as Elite.

of the work. Elite provided some of these allowances, while the County provided the remainder. Any cost for tenant improvements in excess of the allowances Elite provided was the County's sole responsibility. Elite has also put forward documentation that it inquired with the County as to whether prevailing wage requirements applied to the tenant improvement work. After the County explained that prevailing wages were not required, Elite hired contractors to perform the tenant improvement work without requiring the payment of prevailing wages.

According to Elite, the County paid \$1,342,152⁴ for its share of the tenant improvement allowances. Elite claims that the majority of this amount was used for the purchase and installation of modular furniture, while the remainder paid for unspecified architectural and engineering services.

Without the benefit of Elite's participation, the Determination concluded that the tenant improvement work was subject to prevailing wage requirements on two separate grounds. First, the Determination found that the tenant improvement work was "public work" under section 1720, subdivision (a)(1) because the County provided public funds for the tenant improvement work, which was completed by private contractors. Second, the Determination found that the tenant improvement work was "public work" under section 1720.2 because the County leased more than 50 percent of the assignable square footage in Building A-9.

On appeal, Elite challenges both these grounds.

First, Elite claims that the Determination incorrectly found that the tenant improvement work was public work within the meaning of section 1720, because Elite paid for the tenant improvement work exclusively with its own funds and the County was obligated to pay only for the modular furniture. Second, Elite argues that "property" as used in section 1720.2 refers to the entirety of The Alhambra, as opposed to only Building A-9. Elite reasons that because the Determination read "property" to include only Building A-9, the Determination erroneously concluded that the County leased more than 50 percent of the assignable square footage of the property.

⁴ The Determination found that the amount the County provided was \$1,342,450, which was what the County reported to the Department. This minor discrepancy does not affect the conclusions reached in this Decision on Appeal.

The Department considers each of these arguments in turn.

III. DISCUSSION

A. **The Determination Correctly Concluded that the Tenant Improvement Work was Paid for Out of Public Funds.**

Section 1720, subdivision (a)(1) (hereafter section 1720(a)(1)), defines “public works” to mean: construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds. “There are three basic elements to a ‘public work’ under section 1720(a)(1): (1) ‘construction, alteration, demolition, installation, or repair work’; (2) that is done under contract; and (3) is paid for in whole or in part out of public funds.” (*Busker v. Wabtec Corporation* (2021) 11 Cal.5th 1147, 1157 (*Busker*)). As the Determination found, the first two elements are satisfied because construction work was performed by contractors. The element in dispute is whether the tenant improvement work was paid for out of public funds. Elite argues that it alone paid for the tenant improvement work completely out of its own private funds.

1. The Lease contemplates payment of County funds for the tenant improvements.

Elite’s argument is straightforward. Elite insists that the Lease requires it to pay for the actual tenant improvements, while the County’s share includes only the purchase and installation of modular furniture. It asserts that the parties paid for their respective pieces according to the Lease’s provisions. As support for its claim, Elite points to Section 23 (entitled “Tenant Improvements”) of the Lease and Section 9.1 of the Landlord’s Work Letter, an attachment to the Lease. Elite also submitted a declaration from its senior property manager to establish that Elite *actually* paid for construction of the tenant improvements and the County *actually* paid for the modular furniture.

What Elite relies on is unhelpful to its position. Turning first to the Lease, the relevant provisions of Section 23 merely split the responsibility for the tenant improvement allowances between Elite and the County. Elite bears responsibility for the “base tenant improvement allowance,” while the County is responsible for the “additional tenant improvement allowance.” Both these allowances are allocated “for the

cost of the design and construction of the Tenant Improvements per the terms and conditions of the Landlord's Work Letter." No provision restricts the use of one allowance exclusively for improvements and the other allowance only for furniture. Accordingly, the Department reads Section 23 to require both Elite and the County to pay for tenant improvements as defined in the Lease.

Turning to the Landlord's Work Letter, Section 9.1 generally describes the process for procuring furniture systems. Elite focuses on Section 9.1's second paragraph, which provides that:

Landlord shall provide the modular furniture set forth in the Modular Specifications and shall not be responsible for the cost of such modular furniture in excess of the Additional Tenant Improvement Allowance, since Tenant shall utilize the Additional Tenant Improvement Allowance to pay for the cost of the modular furniture set forth herein. Tenant shall reimburse the Landlord for the cost of the modular furniture as set forth in Section 6.3 hereof.

Section 9.1 likewise offers no support for Elite. The paragraph simply obligates the County to pay for the modular furniture. But nothing in Section 9.1 suggests that the County is required *only* to pay for the modular furniture out of its share of the tenant improvement allowance. In fact, language elsewhere in the Landlord's Work Letter points to the contrary. For instance, "tenant improvements" are defined in the Landlord's Work Letter as including "improvements required by the Final Plans" (i.e., construction) *and* modular furniture. (See Landlord's Work Letter, Section 6.2.)⁵ The Final Plans are comprised of the architectural drawings for the improvements and engineering drawings with complete mechanical, electrical, plumbing, and HVAC plans. (See Landlord's Work

⁵ Section 6.2 provides: "*All improvements required by the Final Plans [i.e., construction] and modular furniture described in the Modular Specifications, as further described in Addendum B and Addendum C hereto, shall be collectively referred to herein as "Tenant Improvements" and the cost thereof shall be first borne by Landlord (subject to the Base Tenant Improvement Allowance) and later reimbursed by Tenant in the manner provided for in Section 6.3 hereof. Costs of Tenant Improvements may include costs for furniture, telecommunications equipment, soft costs and any other costs designated in writing by Tenant in the aggregate not to exceed the Base Tenant Improvement Allowance and the Additional Tenant Improvement Allowance, as defined in Section 1 hereof ("Tenant Improvement Costs"). Landlord shall be solely responsible for any delay in completing the Tenant Improvements.*" (italics added.)

Letter, Sections 5.2 and 5.3.) Any cost for “tenant improvements,” as defined, that exceeds Elite’s tenant improvement allowance must be paid by the County. (*Ibid.*)

Taken together, a reasonable interpretation of these provisions is that (1) Elite and the County are both responsible for tenant improvements, (2) tenant improvements include preconstruction, construction, and installation of modular furniture, and (3) the County is solely responsible for the modular furniture portion of the tenant improvements, but the County may pay for other segments of the tenant improvements, such as the construction or the engineering work.

The operative statutory language is that the project be “paid for in whole *or in part* out of public funds.” (§ 1720, subd. (a)(1), italics added.) The Lease provides that the County is responsible for any tenant improvement costs beyond Elite’s \$3,112,648 tenant improvement allowance. By including in the Lease a combined \$5,641,674.50 tenant improvement allowance, Elite and the County contemplated that tenant improvement costs for the project could conceivably reach that figure and that the County’s share was estimated to reach \$2,529,026.50. The County committed to providing a specific amount of funds to pay for tenant improvements, and those County funds paid for the tenant improvements in part irrespective of how the parties wanted to allocate one type of funding to one type of tenant improvement cost and another type of funding to another type of tenant improvement cost. In the end, the funds the County committed for tenant improvements “serve to reduce a developer’s project costs.” (*Hensel Phelps Construction Co. v. San Diego Unified Port Dist.* (2011) 197 Cal.App.4th 1020, 1034). Regardless of what segment of the tenant improvements the County funds specifically paid for, the County was contractually obligated to pay in part for some portion of the tenant improvements. Under those circumstances, the tenant improvement project is a public work even if it turns out that the County funds committed for the project were more than necessary and did not actually pay for the construction. (*Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194, 216.) Allowing contractors to avoid paying prevailing wages merely because an after-the-fact examination reveals that construction costs were initially overestimated would “seriously undermine” the purposes of the prevailing wage law. (*Ibid.*)

2. Elite's argument that the tenant improvements were not actually paid for out of public funds is belied by Elite's own declaration and the Lease.

Although the County did not spend all the funds it committed, the County did ultimately pay \$1,342,152 for the tenant improvements. Under the Landlord's Work Letter that Elite heavily relies on, tenant improvements are specifically defined to include modular furniture. (Landlord's Work Letter, Section 6.2.) And so, despite Elite's argument to the contrary, the County did *actually* pay for the tenant improvements.

In the declaration of its senior property manager, Elite states that the County's share of the tenant improvement allowances paid for unspecified architectural and engineering services, as well as the purchase and installation of modular office systems⁶ such as "workstation parts, work surfaces, filing cabinets, workstation dividers, under cabinet lights, and conference tables." The Landlord's Work Letter defines modular office systems as "tenant improvements" and County money paid for "tenant improvements," as defined, in the form of modular office systems. The "tenant improvements" were therefore paid for in part out of public funds. In addition, the assembly of "freestanding and affixed modular office systems," which is what the County paid for, *is* considered statutory public work. (§ 1720, subd. (a)(1); see also PW 2013-027, *Los Angeles Community College District Furniture Contracts – Los Angeles Community College District* (Nov. 5, 2014).) Elite, perhaps recognizing that public work includes assembly of modular office systems, cites to PW 2008-035, *Open Item Contract WA00023961 - Modular Furniture - County of Sacramento* (Nov. 24, 2009) for the proposition that installation of only affixed modular furniture systems is covered. However, the cited determination predates the legislative amendment to section 1720(a)(1), which was enacted specifically to overturn the Department's determinations that installation of only affixed modular furniture systems was subject to the prevailing wage law. (See *Busker, supra*, 11 Cal.5th at p. 1162)⁷ The amendment's legislative

⁶ "Modular office system assembly is generally done as part of new construction for the purpose of creating work stations." (Assembly Bill No. 1598 Senate Floor Analysis (Aug. 20, 2012.) Elite's declaration shows the majority of County funds earmarked for "modular furniture" were used to pay for workstations.

⁷ See Assembly Bill No. 1598 (stats. 2012, ch. 810, § 1).

history “explains that the process of assembling freestanding office systems, like cubicles, involves work analogous to installing modular walls secured to a structure.” (*Ibid.*) These amendments have been in effect since 2013, long before the Lease was entered into, and thus applicable to the Lease.

Furthermore, Elite concedes that the County paid for unspecified architectural and engineering services. These types of design and preconstruction services often include work such as testing, inspection, soil sampling, and surveying, all work that is covered under the prevailing wage law. (See former § 1720, subd. (a)(1) [“work performed during the design and preconstruction phases of construction, including, but not limited to, inspection and land surveying work.”])⁸ To the extent that the architectural and engineering services include any covered preconstruction work, County funds paid for that public work. In short, the County’s payment for the purchase and installation of modular office systems, including unspecified architectural and engineering services to the extent they entailed covered preconstruction work, constitutes payment for the tenant improvements *in part* out of public funds. (§ 1720, subd. (a)(1).)

B. As Used in Section 1720.2, the “Property” Refers to Building A-9.

The above conclusion that the tenant improvement work was “public work” under section 1720(a)(1) effectively disposes of Elite’s appeal.

However, the Determination also found alternatively that the tenant improvement work was public work under section 1720.2.⁹ Elite challenges this finding on appeal and

⁸ During the pendency of this request, the Legislature passed Assembly Bill No. 1768 (stats. 2019, ch. 719, § 1) to expand the definition of “preconstruction” work. The statutory expansion does not affect this Decision on Appeal.

⁹ Section 1720.2 reads: “For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, “public works” also means any construction work done under private contract when all of the following conditions exist:

(a) The construction contract is between private persons.

(b) The property subject to the construction contract is privately owned, but upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.

(c) Either of the following conditions exist:

(1) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.

argues that the condition in section 1720.2, subdivision (b) has not been satisfied, because it asserts that the Department should have considered the 923,290 total square feet of rentable space available at The Alhambra complex as a whole – rather than only the square footage of Building A-9 – in calculating whether “more than 50 percent of the assignable square feet” is leased to the County for its use. (§ 1720.2, subd. (b).) Elite does not argue that the other conditions in section 1720.2 are unmet. DLSE filed a brief in support of its argument that the “property” as used in section 1720.2 should be limited to Building A-9. Both parties contend that their respective readings of “property” are supported by the unambiguous language of the statute and each suggest that additional analysis is unnecessary, though DLSE cited the relevant case law and legislative history to bolster its argument.

When interpreting statutory language, the California Supreme Court has instructed that the “fundamental task is to ascertain the Legislature's intent and effectuate the law's purpose, giving the statutory language its plain and commonsense meaning.” (*Busker, supra*, 11 Cal.5th at p. 1157.) That task requires an examination of the language in the “context of the entire statutory framework to discern its scope and purpose and to harmonize the various parts of the enactment.” (*Ibid.*) The competing interpretations from the parties suggest that the language “permits more than one reasonable interpretation,” in which case, the “wider historical circumstances of a law's enactment may also assist in ascertaining legislative intent, supplying context for otherwise ambiguous language.” (*Id.* at pp. 1157-1158.)

The “property” as used in section 1720.2 is susceptible to both DLSE's and Elite's respective readings. DLSE cites various legislative history documents that repeatedly make reference to a single “building.” An appellate decision also appears to equate the “property” with the “entire building.” (*Plumbers & Steamfitters, Local 290 v. Duncan* (2007) 157 Cal.App.4th 1083, 1091 (*Local 290*).) Viewed in isolation, this case authority and legislative history offer compelling support for DLSE's argument. Yet Elite

(2) The construction work is performed according to plans, specifications, or criteria furnished by the state or political subdivision, and the lease agreement between the lessor and the state or political subdivision, as lessee, is entered into during, or upon completion of, the construction work.”

also argues persuasively that such references could merely be examples of how “property” may refer to a single building when the property consists of only one building. In this case, Elite claims that Building A-9¹⁰ is part of a multi-building complex and all the buildings are interconnected, thereby collectively forming the “property.” None of the buildings within the complex, Elite contends, can operate independently.

A review of the sparse legislative history indicates that the Legislature indeed referred many times to “buildings,” “structures,” and “facilities” when considering adoption of the law. What appears to have originally motivated the Legislature was a practice where private developers constructed a building for public use without paying workers the prevailing wage and, thereafter, would lease the completed building to public entities. (See Senate Committee on Industrial Relations, Analysis of A.B. 3235 (June 27, 1974).)¹¹ The overall concern driving the law’s enactment was that prevailing wages were not being paid to workers who constructed, altered, or repaired facilities intended mainly for public use and leased primarily by a public entity. By establishing a “more than 50 percent” requirement, the Legislature “intended to create a bright line rule for determining when construction on a privately owned *building* qualifies as a public works project.” (*Id.* at p. 1091, italics added.)

While “property” could be construed as the whole of The Alhambra complex as Elite contends, the better view under these facts is that “property” is limited to Building A-9. The legislative history makes no mention of a group of multiple buildings comprising a “property” and envisions only individual buildings, structures, or facilities.

¹⁰ In its reply brief, Elite also claims for the first time, in passing, that Building A-9 West and East are actually two buildings connected by a bridge. However, the evidence cited does not appear to support that claim, the argument is undeveloped, and Elite does not discuss in detail what import the claim has on its overall argument.

¹¹ A.B. 3235’s Enrolled Bill Report from the Department of General Services states the problem more broadly: “The motivation for this bill appears to be the desire to require, by statute, any person who builds, alters, or repairs structures which will ultimately be leased to the State or other political entities, to pay prevailing wages, and to require those subcontractors who may be hired to also pay prevailing wages.” (Enrolled Bill Report on A.B. 3235 (Sep. 17, 1974).) However, this motivation “does not imply that the Legislature intended to limit the scope of the provision to instances of new construction.” (*Local 290, supra*, 157 Cal.App.4th at p. 1090.)

While it is true the Legislature could have intended to include multiple buildings when it used the term “property,” nothing in the legislative history suggests it ever gave that interpretation any consideration. In addition to the legislative history, the only reported appellate decision analyzing section 1720.2 held that the “‘property’ to which this subparagraph refers is the entire structure, not simply the space that is subject to the lease,” and referred to the “property” as the “entire building.” (*Local 290, supra*, 157 Cal.App.4th at p. 1091.)

Aside from the legislative history and case law that seem to equate the “property” with a single building, using a building as the measure to determine whether “more than 50 percent of the assignable square feet” also makes sense for other reasons. For instance, the building is an enclosed unit that can be readily identified. The task of approximating the total amount of assignable square feet in a building, where the physical boundaries are clearly delineated, is relatively simple. A public entity lessee can estimate the amount of square footage in a building by taking the square footage of the space they are leasing, multiplied by the easily-discernible number of floors in the building. By contrast, tallying the square footage in a complex with multiple buildings and structures, some of which may be designed for different uses, is a more challenging endeavor. Without assistance from the private entity lessor, neither the public entity lessee nor a contractor performing tenant improvement work could accurately guess the total square footage in a multi-use complex.

In addition, a single building generally is restricted to a small number of uses, such as office space or residences. A sprawling multi-use complex, on the other hand, can include office buildings, retail establishments, residences, manufacturing facilities, commercial space, and so on. Of the many uses that exist in a multi-use complex, a public entity typically only leases office space. It would not serve the law’s purposes to deny the prevailing wage to workers working on a multi-use complex where all the office buildings are fully leased to public entities but “more than 50 percent” of the complex’s total square footage is concentrated in facilities, like residences and retail, that public entities do not typically lease. And it would be unreasonable to oblige a contractor to determine how much square footage exists in other buildings within a complex when the

publicly-leased building on which the contractor is working clearly meets the “more than 50 percent” threshold.¹²

“Parties must be able to predict the public-works consequences of their actions under reasonably precise criteria and clear precedent.” (*McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1593, superseded by statute on another ground as stated in *State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 307.) “A nebulous standard or set of factors governing whether” construction work on property leased by a public entity is subject to prevailing wage requirements “would create confusion and uncertainty.” (*Sheet Metal Workers' Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 213, disapproved on other ground by *Mendoza v. Fonseca McElroy Grinding Co., Inc.* (2021) 11 Cal.5th 1118.) Obliging parties to tally total square footage in a complex, which may not have well-defined boundaries (or boundaries only known to the private entity lessor), is an amorphous standard particularly when set against the bright-line rule of counting whether over 50 percent of a single building’s square footage is publicly-leased.

In this case, the County leased 10 out of the 14 floors of Building A-9. Anyone, such as a contractor, a County employee, or a member of the public stepping foot in Building A-9 would promptly recognize that Building A-9 is in effect a County building, as the majority of the building consists of County offices. Parties can predict the public works consequences of work in that building under relatively clear criteria (§ 1720.2), if DLSE’s position is adopted. Conversely, Elite’s reading imposes on parties an obligation to research the square footage in other buildings elsewhere in a complex, which serves neither the interests of the parties nor the purposes of the prevailing wage law.

The prevailing wage law is construed liberally to fulfill the law’s various purposes. (*Kaanaana v. Barrett Business Services, Inc.* (2021) 11 Cal.5th 158, 166 (*Kaanaana*.) “The overarching purpose of the prevailing wage law is to ‘protect and benefit employees on public works projects.’” (*Ibid.*, quoting *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985.) “It protects those who work under contract for covered

¹² One can easily imagine a situation where workers are denied the prevailing wage simply because public entities are leasing all of the first building and less than half of the second building in an office campus with three buildings of equal size.

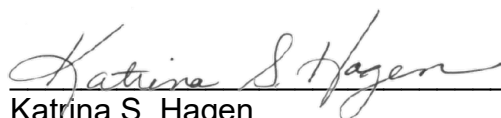
districts from substandard wages, benefits the public through the superior efficiency of well-compensated workers, and results in higher wages to make up for lack of job security and benefits that normally attach to public employment.” (*Kaanaana, supra*, 11 Cal.5th at p. 172.) Because workers would be paid the prevailing wage under DLSE’s interpretation that “property” in this case refers only to Building A-9, “[t]hat interpretation serves the prevailing wage law’s purposes.” (*Ibid.*) Although the Supreme Court has cautioned that liberal construction “is a different enterprise from rewriting the law to have it read as we think best,” (*Mendoza, supra*, 11 Cal.5th at p. 1142), reading the “property” to mean only Building A-9 in this instance is consistent with the statutory framework and offers clear guidance. There may be instances where two or more structures in close proximity to each other are deemed to collectively form the “property” as used in section 1720.2, but that is not the situation presented here.

As explained in the Determination and in this Decision, the tenant improvement work at Building A-9 was paid for in part out of public funds. The work also qualifies as public work as it satisfies the conditions set forth in section 1720.2. On appeal, Elite has not presented a sufficiently compelling case to challenge either of these conclusions.

IV. CONCLUSION

In summary, for the reasons set forth in the Determination, as supplemented by this Decision on Appeal, the Appeal is denied and the determination that prevailing wages are required for tenant improvement work at Building A-9 of 1000 South Fremont Avenue in Alhambra, California performed for the County of Los Angeles under the specific factual circumstances described is affirmed. This Decision on Appeal constitutes the final administrative action in this matter.

Dated: February 3, 2022


Katrina S. Hagen
Director of Industrial Relations