§ 235. Investigation and hearing. 1. Whenever the fiscal officer has reason to believe that a service employee has been paid less than the wages stipulated in the contract, or if such contract has no wage schedule attached thereto and the fiscal officer has reason to believe that a service employee has been paid less than the wages prevailing for his craft, trade or occupation, the fiscal officer may, and upon receipt of a written complaint from an employee employed thereon, shall conduct a special investigation to determine the facts relating thereto.

2. a. At the start of such investigation the fiscal officer may notify the financial officer of the public agency interested who shall, at the direction of the fiscal officer, forthwith withhold from any payment due to the contractor executing the contract sufficient money to safeguard the rights of the service employees and to cover the civil penalty that may be assessed as provided herein, or, if there are insufficient moneys still due or earned to the contractor or subcontractor to safeguard the rights of the service employees and to cover the civil penalty that may be assessed as provided herein, the financial officer of another civil division which has entered or subsequently enters into a building service work contract with the contractor or subcontractor, who shall withhold from any payment due the contractor or subcontractor executing any building service work, sufficient moneys to safeguard the rights of the service employees and to cover the civil penalty that may be assessed as provided herein.

b. If there are still insufficient moneys still due or earned to the contractor or subcontractor to safeguard the rights of the service employees and to cover the civil penalty that may be assessed as provided herein, the financial officer shall immediately so notify the fiscal officer, who may issue a notice of withholding to any of the following: any substantially-owned affiliated entity or successor or subsidiary of the contractor or subcontractor; an officer of the contractor or subcontractor who knowingly participated in the violation of this article, any of the partners, if the contractor or subcontractor is a partnership, or any of the five largest shareholders of the contractor or subcontractor, as determined by the fiscal officer.

c. The notice of withholding shall provide that the fiscal officer intends to instruct the financial officer, not less than ten days following service of the notice by mail, to withhold sufficient moneys to safeguard the rights of the service employees and to cover the civil penalty that may be assessed as provided herein, from any payment due the notified party under any building service work contract pending final determination. The notice of withholding shall provide that within thirty days following the date of the notice of withholding the notified party may, contest the withholding on the basis that the notified party is not a partner or one of the five largest shareholders of the subcontractor or contractor, an officer of the contractor or subcontractor who knowingly participated in the violation of this article, a substantially-owned affiliated entity or successor. If the notified party fails to contest the notice of withholding, or if the fiscal officer, after reviewing the information provided by the notified party in such contest, determines that the notified party is a partner or one of the five largest shareholders, a substantially-owned affiliated entity, an officer of the contractor or subcontractor who knowingly participated in the violation of this article, or a successor, the fiscal officer may instruct the financial officer to immediately withhold sufficient moneys to safeguard the rights of the service employees and to cover the civil penalty that may be assessed as provided herein from any payment due the notified party under any building service work contract pending the final determination.

d. The financial officer shall immediately implement the notice of withholding and confirm in writing to the fiscal officer the amount of money withheld.

e. If the notified party contests the withholding after a withholding has been effected, and if the fiscal officer determines that the notified party is not a partner or one of the five largest shareholders, a substantially-owned affiliated entity or successor, an officer of the contractor or subcontractor who knowingly participated in the violation of this article the fiscal officer shall immediately notify the financial officer to release all payments being withheld from the notified party.

f. The money shall be held in trust pending completion of the investigation.

3. If, despite the requirements of law, the contract for the service work has been awarded without the annexation thereto of the schedule of wages provided for in this article, the fiscal officer shall determine in the proceeding before him the wages prevailing at the time the work was performed for the crafts, trades or occupations of the employees involved.

4. In an investigation conducted under the provisions of this section, the inquiry of the fiscal officer shall not extend to work performed more than two years prior to: (a) the filing of the complaint, or (b) the commencement of the investigation upon the fiscal officer's own volition, whichever is earlier in point of time.

5. a. The investigation and hearing shall be expeditiously conducted and upon the completion thereof the fiscal officer shall determine the issues raised and shall make and file an order in his office stating such determination and forthwith serve personally or by mail a copy of such order and determination together with a notice of filing upon all parties to the proceeding and upon the financial officer of the public agency involved.

b. In addition to directing payment of wages found to be due, such order of the fiscal officer may direct payment of a further sum as a civil penalty in an amount not exceeding twenty-five percent of the total amount found to be due. In assessing the amount of the penalty, due consideration shall be given to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations of the employer, successor or substantially-owned affiliated entity or any successor of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, and any of the partners if the contractor or subcontractor is a partnership or any of the five largest shareholders of the contractor or subcontractor, as

determined by the fiscal officer, of such underpayment of wages or supplements, and any officer of the contractor or subcontractor who knowingly participated in the violation of this article, and the failure to comply with recordkeeping or other non-wage requirements. Where the fiscal officer is the commissioner, the penalty shall be paid to the commissioner for deposit in the state treasury. Where the fiscal officer is a city comptroller or other analogous officer, the penalty shall be paid to said officer for deposit in the city treasury.

c. If the order directs the payment to specified employees of wages found to be due and unpaid, including interest at a rate not less than six per centum per year and not more than the rate of interest then in effect as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the time such wages should have been paid, the financial officer of such public agency shall, upon the service to him of such order, pay to such employees from the trust money withheld the amounts specified in such order and shall pay the civil penalty as provided herein, provided no review proceeding pursuant to the provisions of article seventy-eight of the civil practice law and rules is commenced within thirty days of the date said order was filed in the office of the fiscal officer. If such review is timely commenced, the money withheld shall remain in trust pending final disposition of the review proceeding. In determining the rate of interest to be imposed the fiscal officer shall consider the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations of the employer, successor or substantially-owned affiliated entity or any successor of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, and any of the partners if the contractor or subcontractor is a partnership or any of the five largest shareholders of the contractor or subcontractor, as determined by the fiscal officer, and the failure to comply with recordkeeping or other non-wage requirements.

6. When a final determination has been made and such determination is in favor of an employee, such employee may, in addition to any other

remedy provided by this article, institute an action in any court of appropriate jurisdiction against the person or corporation found to have violated this article, any substantially-owned affiliated entity or any successor of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, and any of the partners if the contractor or subcontractor is a partnership or any of the five largest shareholders of the contractor or subcontractor, as determined by the fiscal officer, for the recovery of the difference between the sum, if any, actually paid to him by the aforesaid financial officer pursuant to said order and the amount found to be due him as determined by said order. Such action must be commenced within three years from the date of the filing of said order, or if the said order is reviewed in a proceeding pursuant to article seventy-eight of the civil practice law and rules, within three years after the termination of such review proceeding.

Provided that no proceeding for judicial review as provided in this section shall then be pending and the time for initiation of such proceeding shall have expired, the fiscal officer may file with the county clerk of the county where the employer resides or has a place of business the order of the fiscal officer containing the amount found to be due. The filing of such order shall have the full force and effect of a judgment duly docketed in the office of such clerk. The order may be enforced by and in the name of the fiscal officer in the same manner, and with like effect, as that prescribed by the civil practice law and rules for the enforcement of a money judgment.

7. When, pursuant to the provisions of this section, two final orders have been entered against a contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership, any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article within any consecutive six-year period determining that such contractor or subcontractor and/or its successor, substantially-owned affiliated entity of the contractor or subcontractor, any of the partners or any of

the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article has willfully failed to pay the prevailing wages in accordance with the provisions of this article, whether such failures were concurrent or consecutive and whether or not such final determinations concerning separate public building service contracts are rendered simultaneously, such contractor, subcontractor, successor, and if the contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership, or any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, or any successor is a corporation, any officer of such corporation who knowingly participated in such failure, shall be ineligible to submit a bid on or be awarded any public building service work for a period of five years from the date of the second order, provided, however, that where any such final order involves the falsification of payroll records or the kickback of wages, the contractor, subcontractor, successor, substantially-owned affiliated entity of the contractor or subcontractor, any partner if the contractor or subcontractor is a partnership or any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public building service contract or subcontract with the state, any municipal corporation or public body for a period of five years from the date of the first final order. Nothing in this subdivision shall be construed as affecting any provision of any other law or regulation relating to the awarding of public contracts.

8. a. When a final determination has been made in favor of a complainant and the contractor or subcontractor found violating this article has failed to make payment as required by the order of the fiscal officer, and provided that no relevant proceeding for judicial review shall then be pending and the time for initiation of such proceeding shall have expired, the fiscal officer may file a copy of the order of the fiscal officer containing the amount found to be due with

the county clerk of the county of residence or place of business of any of the following:

(i) any substantially-owned affiliated entity or any successor of the contractor or subcontractor;

(ii) any of the partners if the contractor or subcontractor is a partnership or any of the five largest shareholders of the contractor or subcontractor, as determined by the fiscal officer; or

(iii) any officer of the contractor or subcontractor who knowingly participated in the violation of this article; provided, however, that the fiscal officer shall within five days of the filing of the order provide notice thereof to the partner or top five shareholder or successor or substantially-owned affiliated entity. The notified party may contest the filing on the basis that it is not a partner or five largest shareholders, an officer of the contractor or subcontractor who knowingly participated in the violation of this article, successor or substantially-owned affiliated entity. If, after reviewing the information provided by the notified party in support of such contest, the fiscal officer determines that the notified party is not within the definitions described herein, the fiscal officer shall immediately withdraw his filing of the order.

b. The filing of such order shall have the full force and effect of a judgment duly docketed in the office of such clerk. The order may be enforced by and in the name of the fiscal officer in the same manner, and with like effect, as that prescribed by the civil practice law and rules for the enforcement of a money judgment.

9. When a final determination has been made against a subcontractor in favor of a complainant and the contractor has made payment to the complainant of any wages and interest due the complainant and any civil penalty, and providing that no relevant proceeding for judicial review shall then be pending and the time for initiation of such proceeding shall have expired, the contractor may file a copy of the order of the fiscal officer containing the amount found to be due with the county clerk of the county of residence or place of business of the subcontractor. The filing of such order shall have the full force and effect of a judgment duly docketed in the office of such clerk. The

judgment may be docketed in favor of the contractor who may proceed as a judgment creditor against the subcontractor for the recovery of all monies paid by the contractor under such order.