



STATE OF NEW YORK  
OFFICE OF THE STATE INSPECTOR GENERAL  
**Final Report**  
**December 11, 2009**

## SUMMARY OF FINDINGS/RECOMMENDATIONS

The New York State Inspector General determined that Robert Arena, the New York State Department of Transportation (DOT) Engineer-in-Charge of certain road construction projects in Westchester, Putnam, Rockland, Orange, Dutchess, Columbia and Ulster counties, submitted fraudulent time records to falsely claim that he was working and to receive unearned overtime pay.

## ALLEGATION

On September 23, 2008, the Inspector General received an anonymous complaint that Robert Arena, another employee,<sup>1</sup> and their supervisor, Wallace Pishtey, allowed contractors to “pad” so-called “Where and When” contracts in order to improperly claim unearned overtime for themselves.

## SUMMARY OF INVESTIGATION

### **Background: “Where and When Contracts” and the EIC**

The New York State Department of Transportation (DOT) is responsible for contracts to construct, improve, repair and maintain roads and bridges within the state. Projects vary in size, scope and duration, from tens of thousands to multi-year, multi-million dollar projects. DOT terms some projects “Where and When” projects which consist of emergency maintenance work on roads and bridges. At all times relevant to this investigation, Ben Ciccone, Inc. (Ciccone) was the contractor for the “Where and When” road repair contract in Region 8 which encompasses Westchester, Putnam, Rockland, Orange, Dutchess, Columbia and Ulster counties.

Normally, a construction contract is bid at a flat rate and, with some exceptions not relevant to this report, the cost for the project remains constant. By contrast, in a so-called “Where and When” contract, the contractor bills DOT for all costs incurred in the performance of the contract (i.e. salaries, materials and equipment) plus an additional

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<sup>1</sup> The Inspector General did not obtain evidence to substantiate the claims against the other employee.

percentage for profit.<sup>2</sup> To the extent that the cost of materials rise or a subcontractor is utilized, that cost, plus the pre-determined profit percentage, is also borne by the state.

In order to control costs on “Where and When” contracts, DOT assigns an Engineer-In-Charge (EIC) to each project. It is the role of the EIC to ensure that work is completed to plans and specifications at as minimal a cost as possible. The EIC is responsible for overseeing the work of the construction contractor as well as every other consultant, vendor or sub-contractor on site. EICs necessarily work with a high degree of independence based upon their responsibilities over various work locations.

An EIC is an upgraded Civil Engineer position. The position is appointed from the ranks of Civil Engineer I and lasts for the duration of a qualifying project. In addition to an annual salary of \$74,597,<sup>3</sup> an EIC earns overtime for all hours in excess of 40 in one week. Overtime is paid for weekend hours and a holiday overtime rate of double time is paid if an EIC works on a state holiday.<sup>4</sup> EICs, like all other DOT employees, must attest to the accuracy of each time record they submit by electronically certifying that “these reports are true and accurate.”

An EIC is entitled to the use of a state car for official business, which may be used for travel between the EIC’s residence and DOT offices and work sites. The EIC is also issued a state gasoline credit card in order to fuel the state vehicle. Even though the employee is permitted to use the vehicle for travel between home and work, the EIC is not “on the clock” and due compensation for commuting time.

EIC Robert Arena resides in Walkill, New York, and is assigned to a DOT Field Office located at 108 Main Street, New Paltz, New York. The distance between Arena’s residence and assigned office is 9.47 miles. While, as set forth above, Arena’s commute between the field office and his residence is not compensable, if Arena drives from his home to a work location other than his assigned field office, and vice versa, that travel time may be compensable if the trip is in excess of one hour. Arena has been assigned to the emergency road repair “where and when” contracts in Region 8 since 2007, overseeing the work conducted by Ciccone.

### **The Inspector General’s Review of Records**

The Inspector General obtained the EIC reports, the DOT inspectors’ reports, and Ciccone work records for the projects in question. As part of his job duties, Arena was required to either submit or review all of the work records for these projects, and most of the records bore Arena’s signature as either the drafter or reviewer.

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<sup>2</sup> DOT enters into “Where and When” contracts for emergency repair work where the exigency would not permit the normal bidding process. As it is impossible to determine the nature of the emergency which will need to be addressed, the cost plus pricing method has been established.

<sup>3</sup> This wage rate is the maximum annual salary payable at grade 22 exclusive of location differentials and overtime payments. The maximum annual salary is granted to employees with seven or more years of service in the grade. The maximum annual salary for a Civil Engineer I is \$67,484.

<sup>4</sup> Rather than obtaining double time for working holidays, DOT workers can choose to take straight time plus the award of 8 hours of holiday time to be taken at a later date. The holiday time never lapses and can be taken years after the date of accrual most likely increasing the value of the hours with increased wages due to collective bargaining agreements or promotions.

The Inspector General also obtained Arena's time and attendance records, the review of which revealed that Arena claimed extensive overtime. This overtime was approved by Arena's direct supervisor, Wallace Pishtey. To justify his claims for overtimes, in the notes section of the time sheets, Arena repeatedly certified, "overtime necessary to cover contractors operations."<sup>5</sup> The Inspector General compared Arena's time and attendance records to the contractor's daily records of manpower and equipment use and noted that Arena often worked hours in excess of those indicated on the contractor's daily records. Part of that difference, however, may be explained because of the multiple sites and varying work hours across the sites. The Inspector General noted, however, that Arena indicated that he worked on Memorial Day (May 28) 2007, an official state holiday, attesting on his time card that "overtime necessary to cover contractors operations worked Memorial Day." Undermining Arena's claim, an examination of records from the contractor revealed that Ciccone did not conduct any work on that day.

The Inspector General also reviewed Ciccone's records and found no evidence that the contractor "padded" its invoices as alleged.

### **Surveillance**

The Inspector General conducted surveillance of Arena and subsequently compared these observations with Arena's submitted time sheet. Surveillance revealed numerous instances where Arena submitted falsified time records and claimed unearned overtime. The following are representative samples of the results of the surveillance and subsequent comparison with submitted time sheets.

On July 28, 2009, surveillance demonstrated that Arena departed from his home at 6:09 a.m. and arrived at his field office parking lot at 6:25 a.m. where he remained in his car until 6:40 a.m. After speaking with an unknown male, Arena entered his office at 6:52 a.m. and remained there until 3:02 p.m. when he departed for his residence, arriving there at 3:15 p.m. On his submitted time record for that date, Arena attested that he commenced work at 6:30 a.m., took a half hour lunch at noon, and ceased work at 4:30 p.m., thus claiming 10 working hours, two of which constituted overtime. Surveillance revealed, however, that Arena worked less than eight hours (7 hours and 40 minutes).<sup>6</sup> Therefore, in addition to claiming unearned overtime, Arena failed to even fully complete his required eight-hour day.

On August 18, 2009, Arena was observed departing from his home at approximately 5:25 a.m. and arriving at a work site on Route 9W in Cornwall, New York at 6:00 a.m. By 7:50 a.m., Arena had returned to his field office in New Paltz, and at 10:30 a.m., he returned home where he remained the rest of the day. Despite only working 4.5 hours that day, Arena claimed on his timesheet that he commenced work at 6:30 a.m.,<sup>7</sup> took a half hour lunch at noon, and ended his work day at 5:30 p.m., amounting to 10.5 working hours, 2.5 of which constituted overtime.

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<sup>5</sup> In the two and a half plus years of Arena's time sheets which were reviewed by the Inspector General, only one or two instances exist where Arena entered something other than the quoted rationale.

<sup>6</sup> Arena's time is being reduced by one half hour for lunch as required by Labor Law §162.

<sup>7</sup> The Inspector General notes and discusses later in this report the variances between the start and stop times indicated on Arena's time sheets as compared with surveillance results.

On September 2, 2009, Arena departed his home at approximately 5:30 a.m., arriving at his New Paltz field office at 5:47 a.m. At 10:10 a.m., Arena left his office and drove to the New Paltz post office where he sat in the car reading mail until 10:28 a.m. He then drove to a bagel shop where he remained until 10:46 a.m. After eating, Arena departed and, crossing the Mid-Hudson Bridge, arrived at the Poughkeepsie Galleria Mall at approximately 11:13 a.m. where he made a personal purchase at Dick's Sporting Goods. Arena then drove to a DOT work site on Route 9W in Cornwall, arriving at 12:25 p.m. From Cornwall, Arena returned to his New Paltz field office and, at 3:50 p.m., he returned to his home. On his time sheet, Arena claimed he began work at 6:30 a.m.,<sup>8</sup> took a half hour lunch at noon, and worked until 4:00 p.m. - nine working hours, one hour of which constituted overtime. Contrary to his timesheet, at best, Arena worked less than his claimed eight hours and compounded his misuse of state resources by using his DOT-assigned vehicle and his state-issued E-ZPass to pay the bridge toll for his personal excursion.

### **Interview of Robert Arena**

The Inspector General interviewed Arena at the DOT district offices in Lagrangeville, New York. Arena confirmed that his normal work hours are from 7:00 a.m. to 3:30 p.m., with a half hour for lunch. Arena reported that he works in accord with the contractor's work hours and is often required to be at work before 7:00 a.m. and after 3:30 p.m. Arena advised that if he is required to commence work prior to his scheduled 7:00 a.m. start time, he still must work until at least 3:30 p.m. that day. Arena averred that contractors rarely work on Saturday and almost never work on a Sunday. Arena further revealed that while he occasionally received work-related calls at home in the evening and has been summoned to respond to emergency situations, these instances occurred infrequently. Arena further admitted that he is not authorized to work from home.

Asked about his actions on July 28, August 18, and September 2, 2009, Arena initially stated that he did not recall his whereabouts on those dates. When confronted with surveillance evidence of his activities on those dates, Arena admitted that he left work early on July 28 and August 18 and did not return.<sup>9</sup> He claimed, however, that he completed some work from home.<sup>10</sup> When asked for any evidence of this alleged work, Arena was unable to produce any such evidence or suggest any manner in which to verify his claim.

Arena also asserted that he worked many hours in excess of those he listed on his time sheets. Arena maintained that he attended a meeting with his direct supervisor, Wallace Pishtey, and three other DOT employees in early 2008 in which they were instructed to limit their individual yearly overtime below 400 hours - no more than 15 hours of overtime per pay period. Therefore, Arena maintained that he minimized his

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<sup>8</sup> See Footnote 7.

<sup>9</sup> On September 3, 2009, the Inspector General also observed Arena at his home at 3:14 p.m. Arena stated in his interview that he believed he had been home for a while prior to that time and did not return to work on that day. On his time sheet, Arena recorded that he ended his work day at 4:30 p.m.

<sup>10</sup> DOT provided the Inspector General with Arena's sign-on logs for its network computer system. Arena did not sign on to CITRIX at any time other than while in his field office on July 28, August 18, September 2 and 3.

reported hours on his time sheet but worked far in excess of the hours listed. Arena then claimed that he traveled to his home during scheduled working hours to compensate for unreported overtime he worked on other dates. While the Inspector General noticed variances between the start and stop times indicated on his time sheet as compared with surveillance results, the Inspector General failed to discover a single instance where Arena worked more hours than asserted on his time sheet. Arena repeatedly conceded that he did not maintain any record of the purported excess hours he worked and could not produce any other evidence to support his contentions.

When confronted with evidence of his September 2, 2009 shopping trip to the Poughkeepsie Galleria Mall, Arena admitted to the personal nature of the excursion - purchasing "paint ball" equipment at Dick's Sporting Goods - and using the state-assigned vehicle and state-issued E-ZPass for the trip. Arena also advised the Inspector General that he visits the post office box in New Paltz to obtain his personal mail. In total, Arena admitted to using two hours of his business day for personal errands and improperly marking his time sheet.

The Inspector General asked Arena about working on state holidays. Arena claimed that he normally did not work Christmas or Memorial Day but sometimes worked on Columbus Day or Election Day. Arena reported that the state incurs great cost when contractors work on the main holidays because of premium wage payments required by union contracts.<sup>11</sup> Other holidays observed by state employees are not treated as holidays by the construction unions and thus do not require premium wages. If Arena worked on a holiday, he chose to receive straight wages for the day and then eight hours of holiday leave accruals.

When queried about his activities on Memorial Day 2007, Arena initially claimed not to recall anything remarkable about that date. When advised that he certified on his time card that he had worked that day, Arena hypothesized that he must have been supervising contractor work. When advised that none of the contractor's work sites was active that day, Arena seemed unsure and, ironically, speculated that he must have been working if Pishtey approved his time sheet. A few days after his interview, Arena called the Inspector General and now posited that he was completing paperwork on May 28, 2007. When asked if he could produce any documents in support of this claim, Arena stated that all the paperwork he allegedly completed was dated the following day<sup>12</sup> and that he possessed no e-mails to substantiate his claim of having worked on Memorial Day 2007. As set forth above, on his contemporaneous time records Arena attested that he was entitled to overtime for that Memorial Day because he was required to work "to cover contractor operations." The Inspector General finds Arena's defenses fallacious and his claim for overtime fraudulent.

During the interview, Arena expressed concern about losing his job and offered to reimburse the state for time he claimed but did not work. He was further troubled that his activities may reflect poorly on his supervisors and advised the Inspector General that

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<sup>11</sup> Depending upon the type of trade and location, highway construction unions in the area recognize Christmas, Thanksgiving, New Year's Day, Memorial Day, July 4, Labor Day, Veteran's Day and Martin Luther King Jr. Day. If worked, those holidays are paid at a premium wage rate of 2 to 3 times the normal wage rate. As stated earlier, the projects overseen by Arena were financed on a cost plus basis by the state.

<sup>12</sup> Arena did not sign Ciccone's work records from Memorial Day 2007 until June 7, 2007.

Pishtey was unaware that he had falsified time sheets. At the end of his interview, Arena apologized for his misconduct to Barbara Mattice, the DOT Regional Construction Engineer.

### **Interview of Wallace Pishtey**

The Inspector General interviewed Wallace Pishtey, Arena's direct supervisor. Pishtey expressed surprise at the inquiry into Arena's conduct. While Pishtey recalled several meetings about overtime issues in which he had mentioned the 400-hour annual overtime limit, he stated he never indicated that anything but actual hours worked be reported on time sheets. Pishtey informed the Inspector General that he required Arena to provide him with projected overtime on a bi-weekly basis in order for Pishtey to assess its reasonableness.<sup>13</sup> Pishtey claims that he is able to determine the reasonableness of overtime estimates and actual overtime worked by visiting work sites, observing work progress and speaking to the employees.

Pishtey advised the Inspector General that field inspectors are not authorized to work from home, and that while these employees may receive emergency phone calls at home, actual work must be performed in the field.

When shown Arena's time sheet where he claimed to work on Memorial Day 2007 in order to receive overtime and contractors' records indicating that no worksite was active that day, Pishtey responded that "the only reason we [DOT] would work on a holiday is if the contractor was working." Pishtey did not recall what work, if any, Arena completed on Memorial Day 2007, but admitted that, nonetheless, he had approved Arena's time sheet for the period including Memorial Day 2007. When the Inspector General questioned Pishtey as to how he determines whether an EIC is actually working the hours claimed on his timesheet, Pishtey responded "I have to have some level of trust." Pishtey admitted that, prior to approving Arena's time sheet, he did not review the contractor records or take any other action to verify if work was actually performed on Memorial Day 2007.

### **Cost of Arena's False Time Claims**

The exact amount of compensation Arena fraudulently received is difficult to ascertain as Arena's time sheets are rife with inaccuracies and fabrications. Indeed, in his interview with the Inspector General, in addition to the dates described above, Arena conceded that he was at home on at least 10 occasions despite attesting on his time sheets that he was working. For the dates listed herein alone, the Inspector General conclusively determined that Arena falsified his time records for July 28, August 18, September 2, and September 3, 2009, claiming and receiving payment of \$506.86 in wages to which he was not entitled. Arena's false claim to have worked on Memorial Day 2007 resulted in payment to him of \$244.08 in wages. Thus, on solely those five days, Arena's falsification of time records resulted in a theft from the state of \$750.94. Additionally, the Inspector General valued the cost to the state of Arena's personal shopping excursion

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<sup>13</sup> The Inspector General requested that Pishtey provide copies of the overtime estimates but he was unable to produce these records.

in a state vehicle on September 2, 2009, at \$22.45, including mileage and tolls. Thus, Arena's fraud for these five days totaled at least \$773.39.

## **FINDINGS AND RECOMMENDATIONS**

The Inspector General found that Arena knowingly submitted falsified time sheets to DOT in which he overstated the hours he worked and claimed undeserved overtime. Arena also used his state-issued vehicle and E-ZPass for personal use. The total cost of Arena's fraud against DOT amounts to at least \$773.39.

The Inspector General has referred this matter to the Ulster County District Attorney for his review.

The Inspector General also found that Pishtey failed to adequately supervise Arena and authorized overtime payments without taking reasonable steps to verify if the overtime was actually worked.

The Inspector General found no evidence of wrongdoing on the part of DOT contractor, Ben Ciccone, Inc.

The Inspector General recommended that DOT review the conduct of Arena and Pishtey and take appropriate disciplinary action. Action against Arena should include required restitution of the payments he fraudulently received.

### **Response of the Department of Transportation**

The Department of Transportation advised the Inspector General that it will review Arena's and Pishtey's conduct and take appropriate disciplinary action.