STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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| In the Matter of the Petition of:<br><br>ANTHONY BOUMOUSSA AND BAY PARKWAY SUPER CLEAN CAR WASH INC.,<br><br>Petitioner,<br><br>To Review Under Section 101 of the Labor Law: An Order to Comply under Articles 4 and 19 of the Labor Law and an Order to Comply with Article 19 of the Labor Law, both dated January 23, 2009,<br><br>- against -<br><br>THE COMMISSIONER OF LABOR,<br><br>Respondent. | DOCKET NO. PR 09-058 and SA 09-001<br><br>INTERIM RESOLUTION OF DECISION |

APPEARANCES

Sandback, Birnbaum & Michelen, Oscar Michelen of counsel, for Petitioners.

Maria L. Colavito, Counsel to the New York State Department of Labor, Jeffrey G. Shapiro of counsel, for Respondent.

**WHEREAS:**

On March 19, 2009,[1] Petitioners in this matter, through counsel, filed a petition to review two orders that the Commissioner of Labor (Commissioner or Respondent) issued against them on January 23, 2009. One order is to comply with article 19 of the Labor Law (wage order). Article 19 is entitled "Minimum Wage Act." The wage order finds that Petitioners underpaid wages to 13 employees for the period January 1, 2003 to March 16, 2008, and directs payment of $637,223.81 in wages, $87,989.22 in interest at 16% per year (continuing to accrue at that rate from the date of the order), and $637,224.00 in civil penalties, for a total of $1,362,437.03 found to be due.

The other is a penalty order issued under articles 4 and 19 of the Labor Law. Article 4 is entitled "Employment of Minors." Count 1 of the penalty order assesses a civil penalty in the amount of $271,250 for "failing to keep and/or furnish true and accurate payroll records for each employee" for the period March 14, 2002 through March 14, 2008, in violation of Labor Law § 661 and 12 NYCRR 142-2.6. Count 2 assesses a civil penalty in the amount of $250 for "failing to furnish evidence that [a named employee] is over the age for which an employment certificate is required" in violation of Labor Law § 138.

[1] Unless otherwise indicated, all dates are in 2009.

Along with their petition for review of the wage and penalty orders, Petitioners filed a verified application for a stay of enforcement of the orders and waiver of security. Their application asserts, among other things, that Petitioners' employees are paid weekly in accordance with the Minimum Wage Act; Petitioners have been in business as a car wash since 1986 and this is the first time that they have been the subject of a DOL investigation; they have had a line of credit with a specified bank for five years and have never defaulted on that line of credit; and they also have enjoyed lines of credit with other named entities and vendors since as early as 1986, have never defaulted, and remain in good standing on all lines of credit. Petitioners urge that these facts demonstrate their financial stability and provide a sufficient basis for the Board to stay enforcement of the orders and waive security but, if required, they would post a bond from a qualified fidelity company.

On March 30, the Board served the petition for review and application for stay and waiver on Respondent by mailing them to Counsel to DOL. The Board's letter covering service on the Commissioner states that "[i]n light of an earlier representation of an attorney for the Commissioner of Labor, the Board's experience in comparable matters, and Labor Law § 218 (3), it is the Board's understanding that the Commissioner's practice is NOT to commence or continue proceedings to enforce any orders that are under review by the Board."

The Commissioner's response to the Board's March 30 letter states:

> "Please be advised that while you have correctly stated that the Commissioner of Labor's general and usual practice is not to commence or continue proceedings to enforce orders that are under review by the Board, it is the Respondent's position that in a case involving the review of two Orders that, collectively, involve more than $1.6 million in unpaid wages, interest and civil penalties, a grant of a stay pursuant to Labor law § 101 (2) and Board Rules § 66.9 should be accompanied by posting of security. Absent a bond, the Petitioner's [sic] employees would be seriously prejudiced in that there is a distinct possibility in these uncertain economic times that Petitioner would find itself unable to make full payment if and when the Board issues a decision finding valid and reasonable the Orders at issue. The Respondent asserts that these were exactly the circumstances for which the bonding requirement was created.
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> "The Board's authority to require the posting of such security is clearly set forth in statute and the Board's Rules and the Department will likely seek such security in all significant cases in the future where a stay [is] requested."

Cited by Respondent as authority for the Board's discretion to grant a stay of enforcement and require that security be posted as a condition of the stay, Labor Law § 101 (2) ("Review by industrial board of appeals"), is within article 3,[2] entitled "Administrative & Judicial Review," and provides in relevant part:

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[2] All articles and sections cited are within the Labor Law.

> "The petition shall be filed with the board in accordance with such rules as the board shall prescribe, and shall state the . . . order proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable . . . Except as otherwise prescribed by any provision of this chapter or any other law, the filing of such petition may, in the discretion of the board, operate to stay all proceedings against the petitioner under such . . . order until the determination of such petition." [Emphasis supplied.]

Respondent also relies on the Board's Rules of Procedure and Practice (Rules) § 66.9 ("Stay of Rule, Regulation or Order Sought to be Reviewed; Exceptions"), which is within Part 66, entitled "Proceedings under Section 101 of the Labor Law." Section 66.9 (a) and (c) provide:

> "(a) The filing of a Petition may, in the discretion of the Board, operate to stay all proceedings against the Petitioner under such . . . order until the determination of such Petition. Such discretion may be exercised, if at all, upon written application therefore, which application shall be supported by affidavits, documentary evidence, or other evidence demonstrating the necessity for such stay, the financial responsibility of the applicant when relevant, and that the grant of such stay will not unduly prejudice any employee, the public or the Department of Labor. The Commissioner of Labor shall have such opportunity as the Board shall deem reasonable and sufficient to object to or oppose the application for a stay. [Emphasis supplied.]
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> "(c) A stay of enforcement of a minimum wage compliance order requires the posting of security or the obtaining of a waiver of security as provided for in Section 658. (See subdivision 3 through 7 of Section 657.) The application shall be made in the manner provided in Section 71.10 of these Rules." [Emphasis supplied.]

Labor Law §§ 657 and 658 are within article 19. Labor Law § 658, entitled "Appeals from compliance orders," provides in full:

> An appeal pursuant to section two hundred eighteen or two hundred nineteen of this chapter from an order issued by the commissioner directing compliance with any provision of this article or with any minimum wage order or regulation promulgated thereunder, shall not bring under review any minimum wage order or regulation promulgated under this article. The provisions of subdivision two of section six hundred fifty-seven relating to appeals from determinations of the board and the provisions of subdivisions three through seven of

> section six hundred fifty-seven shall apply to an appeal from a compliance order."

Labor Law § 657 is entitled "Appeals from wage orders and regulations." (Wage orders here refer to specific "minimum wage standards" [Labor Law § 650], recommended by the Wage Board, issued by the Commissioner and setting statewide minimum wage rates for various classes of occupations [Labor Law §§ 652, 655, 657(1)]. As quoted in the above paragraph, Labor Law § 658 provides that Labor Law § 657 (2), (3), (4), (5), (6), and (7) "shall apply to an appeal from [an article 19] compliance order." Those subdivisions of § 657 provide:

> "2. Review by board of standards and appeals [predecessor to the Industrial Board of Appeals]. Any person in interest, including a labor organization or employer association, in any occupation for which a minimum wage order or regulation has been issued under the provisions of this article who is aggrieved by such order or regulation may obtain review before the board of standards and appeals by filing with said board, within forty-five days after the date of the publication of the notice of such order or regulation, a written petition requesting that the order or regulation be modified or set aside. A copy of such petition shall be served promptly upon the commissioner. On such appeal, the commissioner shall certify and file with the board of standards and appeals a transcript of the entire record, including the testimony and evidence upon which such order or regulation was made and the report of the wage board. The board of standards and appeals, upon the record certified and filed by the commissioner, shall, after oral argument, determine whether the order or regulation appealed from is contrary to law. Within forty-five days after the expiration of the time for the filing of a petition, the board of standards and appeals shall issue an order confirming, amending or setting aside the order or regulation appealed from. The appellate jurisdiction of the board of standards and appeals shall be exclusive and its order final except that the same shall be subject to an appeal taken directly to the appellate division of the supreme court, third judicial department, within sixty days after its order is issued. The commissioner shall be considered an aggrieved party entitled to take an appeal from an order of the board of standards and appeals."
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> "3. Security. The taking of an appeal by an employer to the board of standards and appeals shall not operate as a stay of a minimum wage order or regulation issued under this article unless and until, and only so long as, the employer shall have provided security determined by the board of standards and appeals in accordance with this section. The security shall be sufficient to guarantee to the employees affected the payment of the difference between the wage they receive and the minimum

wage they would be entitled to receive under the terms of the minimum wage order or regulation (such difference being hereinafter referred to as "underpayments") in the event that such order or regulation is affirmed by the board of standards and appeals. The security shall be either:

> a. A bond filed with the board of standards and appeals issued by a fidelity or surety company authorized to do business in this state. The bond shall be sufficient to cover the amount of underpayments due at the time the bond is filed with the board of standards and appeals and the amount of underpayments that can reasonably be expected to accrue within the following sixty days; or
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> b. An escrow account established by the employer in behalf of employees and deposited in a bank or trust company in this state, of which the employer has notified the board of standards and appeals in writing that he has established such account. The account shall be sufficient to cover the amount of underpayments due at the time of notification to the board of standards and appeals and shall be kept current by the employer depositing therein the amount of underpayments accruing each and every pay period. Such deposits shall be made no later than the day on which the wages for each pay period are payable. As an alternative thereto, an employer may deposit the amount of underpayments due at the time the deposit is made and the amount of underpayments that can reasonably be expected to accrue within the following sixty days, as determined by the board of standards and appeals. The employer shall keep accurate records showing the total amount of each deposit, the period covered, and the name and address of each employee and the amount deposited to his account. The employees' escrow account shall be deemed to be a trust fund for the benefit of the employees affected, and no bank or trust company shall release funds in such account without the written approval of the board of standards and appeals.

"4. Maintenance of security. The commissioner, at the request and on behalf of the board of standards and appeals, shall have the right to inspect the books and records of every employer who appeals from an order or who provides a security in accordance with subdivision eight of this section. [Subdivision eight pertains to a stay for employers affected by a state-wide minimum wage order from which an appeal has been taken by another employer.] In the event that the board of standards and appeals finds that the security provided by an employer is

> insufficient to cover the amount of underpayments, it shall notify the employer to increase the amount of the security. If the employer fails to increase the security to the amount requested within seven days after such notice, the stay shall be terminated. If the board of standards and appeals finds that the amount of the security is excessive, it shall decrease the amount of security required.
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> "5. Review of determination as to security. Notwithstanding any provision in this chapter, any determination of the board of standards and appeals with reference to subdivision three and four of this section shall be reviewable only by a special proceeding under article seventy-eight of the [CPLR] instituted in the supreme court in the third judicial district within ten days after such determination.
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> "6. Security on court review. In the event that an appeal is taken from the order of the board of standards and appeals to the supreme court in the third judicial district pursuant to subdivision two of this section, the court may continue the security in effect or require such security as it deems proper.
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> "7. Waiver of security. Notwithstanding any provision in this section, the board of standards and appeals may, in its discretion, waive the requirement of a security for an employer who the board of standards and appeals finds is of such financial responsibility that payment to employees of any underpayments due or to accrue are assured without the security provided by this section."

Thus, Labor Law § 101 appears to give the Board discretion to entertain applications for stay of enforcement of orders. Labor Law § 101 applies to review by the Board of "any" order ("[e]xcept where otherwise prescribed by law, any person . . . may petition the board for a review of the validity or reasonableness of any rule, regulation or order made by the commissioner under the provisions of this chapter. . . ." § 101 [1] [Emphasis supplied.]). Sections 657 and 658 apply expressly and exclusively to article 19 orders and regulations and, in the event the Board grants a stay of an article 19 compliance order, §§ 657 and 658 appear to require that the Board also either impose security as a condition of the stay, or expressly waive security based on factors set out in the Rules.

On the other hand, Labor Law § 218, entitled "Violations of certain provisions; civil penalties," is located within article 7, which is itself entitled "General Provisions." Subdivisions 1 and 3 state in pertinent part:

> "1. If the commissioner determines that an employer has violated a provision of article . . . nineteen (minimum wage act) . . . of this chapter, or a rule or regulation promulgated thereunder, the commissioner shall issue to the employer an

> order directing compliance therewith, which shall describe particularly the nature of the alleged violation.
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> "3. Provided that no proceeding for administrative or judicial review as provided in this chapter shall then be pending and the time for initiation of such proceeding shall have expired, the commissioner may file with the county clerk of the county where the employer resides or has a place of business the order of the commissioner, or the decision of the industrial board of appeals containing the amount found to be due including the civil penalty, if any. The filing of such order or decision shall have the full force and effect of a judgment duly docketed in the office of such clerk. The order or decision may be enforced by and in the name of the commissioner in the same manner, and with like effect, as that prescribed by the [CPLR] for the enforcement of a money judgment." [Emphasis supplied.]

Labor Law § 219, entitled "Violations of certain wage payment provisions; interest, filing of order as judgment," is also within article 7 and, similar to § 218, its subdivisions 1 and 3 state in pertinent part:

> "1. If the commissioner determines that an employer has failed to pay wages . . . required pursuant to . . . article nineteen (minimum wage act) . . . of this chapter, or a rule or regulation promulgated thereunder, the commissioner shall issue to the employer an order directing compliance therewith, which shall describe particularly the wages . . . found to be due, including interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of the payment.
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> "3. Provided that no proceeding for administrative or judicial review as provided in this chapter shall then be pending and the time for initiation of such proceeding shall have expired, the commissioner may file with the county clerk of the county where the employer resides or has a place of business the order of the commissioner or the decision of the industrial board of appeals containing the amount found to be due. The filing of such order or decision shall have the full force and effect of a judgment duly docketed in the office of such clerk. The order or decision may be enforced by and in the name of the commissioner in the same manner, and with like effect, as that prescribed by the [CPLR] for the enforcement of a money judgment." [Emphasis supplied.]

As relevant here, Labor Law §§ 218 (3) and 219 (3) each provide that the Commissioner may only enter judgment on the order to comply if no appeal is pending before the Board or any court and if the appeal period has expired. Thus, DOL cannot enter

judgment to enforce an order to comply pending an appeal, which is consistent with the prior practice of DOL. Therefore, Petitioner's request for a stay of enforcement must relate to matters other than an entry of judgment.

The apparent conflict between Labor Law §§ 218 (c) and 219 (c) which does not allow entry of judgment during the pendency of an appeal, on the one hand, and §§ 101, 657 and 658 which makes provision for a stay and security, on the other hand, requires resolution in order for the Board to determine in the instant matter whether it is empowered to entertain Petitioners' application for a stay and Respondent's request that security be required as a condition of granting such stay. Seeking the parties' analysis in reconciling Labor Law §§ 218 (3) - 219 (3) and Labor Law §§ 101, 657 - 658, the Board asked each party to file a memorandum of law regarding the provisions that should govern here. The Board also set the matter down for oral argument at its July 22, 2009 meeting.

In response, the Petitioners now argue that their application for a stay and for waiver of security are unnecessary and that their appeal to the Board effects a stay of enforcement of the wage and penalty orders against them by operation of law. In their written submission, Petitioners assert that the plain language of Labor Law §§ 218 (3) and 219 (3) prevents a judgment being entered on, and enforcement of, the Commissioner's orders while their appeal is pending; the only authority for the Board to require security for a stay is Labor Law § 657 and Rule 70.10; since there is no need for Petitioners to seek a stay – it being automatic under Labor Law §§ 218 (3) and 219 (3) – the security provisions of Labor Law § 657 and Rule 70.10 are inapplicable to Petitioners' petition. Petitioners argue that the Board has no authority to require security in this proceeding.

It should be noted that Rule § 66.9 (c), *supra*, states that "[a] stay of enforcement of a minimum wage compliance order requires the posting of security or the obtaining of a waiver of security as provided for in Section 658" and then states that "[t]he application shall be made in the manner provided in" Rule § 71.10. That Rule is within Part 71, "Appeals under Section 677 of the Labor Law from Minimum Wage Compliance Orders Relating to Farm Workers." Rule 71.10 provides that "[i]n an appeal from a compliance order an application for a determination by the Board as to the sufficiency of security to cause the appeal to operate as a stay of the order, or an application for waiver of security to cause the appeal so to operate shall be made as provided in Part 70 of these Rules, Sections 70.10 and 70.11." Part 70, "Appeals from Minimum Wage Orders and Regulations under Sections 657 and 676 of the Labor Law,"[3] governs the contents of an application for Board determination "as to the sufficiency of security to cause an appeal to operate as a stay," the "application for waiver of security to cause an appeal to operate as a stay," and attendant procedures.

Petitioners' oral argument reiterates their written points and adds the following arguments. Labor Law §§ 218 (2) and 219 (2) both provide that "[a]n order issued under subdivision one of this section shall be final and not subject to review by any court or agency unless review is had pursuant to section one hundred one of this chapter." From this, Petitioners urge that article 19 compliance orders, such as those issued against Petitioners, are not final orders during the pendency of an appeal of the orders before the Board, and therefore, enforcement of the orders is automatically stayed under §§ 218 (c) and 219 (c), and it is unnecessary for Petitioners to apply for either a stay or a waiver of security for a stay.

[3] Labor Law § 676 concerns farm worker minimum wages.

Petitioners emphasize that the automatic stay is necessary as a matter of due process to protect them from injury that may result from the filing of an order with the county clerk in advance of a review of the merits of the order, which Petitioners sought when they filed their petition with the Board. In other words, under §§ 218 (2) and 219 (2), the instant orders are not final and therefore may not, under §§ 218 (3) and 219 (3), be filed with the county clerk to effect a judgment.

Alternatively, Petitioners argue that if the Board is authorized to grant a stay of enforcement in this case, the facts presented support waiving security for such a stay. Petitioners allege that the wage order does not cover many employees and resulted from a complaint of only one employee; that DOL drew erroneous conclusions from an incomplete investigation; that Petitioners are financially stable, having been in business over the period of a number of years at the same location and enjoying lines of credit with various vendors and banks on which they have never defaulted; that the premium for a bond on the wages found due in the wage order ($637,000) would cost approximately $100,000-$150,000, which amount Petitioners would not recover even if the Board ultimately granted their petition; that a requirement that Petitioners post such security would be a significant financial burden for them; and that Petitioners have no history of problems with DOL.

Respondent's written submission asserts that when an appeal is of an order directing compliance with article 19 or any wage order or regulation promulgated under article 19, Labor Law § 657 (2)-(7) requiring the posting or waiver of security applies instead of Labor Law §§ 218 (3) and 219 (3). In addition, she argues that the Board may exercise its authority to grant a stay, or not, upon the filing of an appeal from an article 19 compliance order; however, if a stay is granted, the Board must impose security or waive it. In arguing this point, Respondent relies on Labor Law § 101 (2) (except as otherwise prescribed by law, the filing of a petition may, in the Board's discretion, stay all proceedings against petitioners); Rule 66.9, which reiterates the noted part of Labor Law § 101 (2); Rule 66.9 (c) (stay of enforcement of a minimum wage compliance order requires that the Board impose or waive security as provided in Labor Law § 658 with reference to Labor Law § 657 [3] [7]). Respondent finally maintains that if enforcement of an order is automatically stayed under Labor Law §§ 218 (3) and 219 (3), the Board has no authority to grant a stay, to require security, or to waive security, and the provisions of Labor Law §§ 657 and 658 do not apply.

Respondent's oral argument, like Petitioners', relies on her earlier filed written arguments. Additionally, Respondent concedes an apparent incompatibility between Labor Law § 101 (2) and Labor Law §§ 218 (c) and 219 (c), but urges that by applying rules of statutory construction they are made compatible: § 101's provision for a stay is deemed applicable only to those compliance orders based on findings that provisions of article 19 have been violated.

Concerning Petitioners' arguments based on the underlying facts, Respondent notes that there has not been a hearing in this matter and that no facts have been found; that Petitioners are basing their argument for a waiver on mere allegations; that in any event, the Board must first determine whether it has authority to grant a stay before it may address any question about whether to waive security for the stay.

In response to questions posed by and on behalf of the Board, Respondent contends that the "proceedings" that the Board has discretion to stay under Labor Law § 101 (2) refer

only to collection proceedings upon the enforcement of an order that has been reduced to a judgment and filed with the county clerk. Respondent asserts that a stay granted by the Board here would stay her right to file a judgment with the appropriate county clerk, but that in the absence of a stay, for example where a petitioner does not apply for a stay of enforcement of an article 19 compliance order or application is denied, she has the right to file a judgment to preserve her rights to collect on it in the future and avoid a petitioner's divestment of assets or other attempt to evade the order, but is empowered to actually enforce the judgment only after Board and judicial review of the order is concluded and the order is sustained or the time for review has expired.

Respondent argues that filing an order with a county clerk before hearing in order to effect a judgment against a petitioner, pursuant to Labor Law §§ 218 (c) and 219 (c), does not raise due process concerns because the judgment can be rescinded if the Board, after hearing, were to revoke, amend or modify the order. Any harm to the petitioner to have a judgment against it on file with the county clerk while its appeal of the underlying order is pending is countered by the harm to the Commissioner and employees who may be at risk of not being able to collect what they are due under the order in the event that the Board ultimately sustains it.

In response to Board questions, Petitioners assert that the Respondent wants the orders here turned into judgments in spite of the absence of a hearing on the merits of the finding upon which the orders are based and the clear statutory prohibition of reducing the orders to a judgment during the pendency of an appeal. They emphasize that they may suffer irreversible injury, for example, loss of their lines of credit and business should a judgment be filed in advance of a hearing and that such loss could not be recovered even upon reversal of the orders and rescission of any judgment that Respondent might effect.

## FINDINGS

Since the Commissioner argues that the stay would only apply to entry of judgment, the Board finds that it has no authority to issue a stay of entry of judgment on the order to comply because the Commissioner may not enter judgment where there is an appeal pending per Labor Law §§ 218 and 219.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
August 27, 2009.