STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: DIANA ALLAHAM, Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law, and an Order Under Article 19 of the Labor Law, both dated January 27, 2010, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 10-059 RESOLUTION OF DECISION

APPEARANCES

Diana Allaham, *pro se* Petitioner.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin T Garry of Counsel, for the Respondent.

WITNESSES

Diana Allaham for the petitioner; Labor Standards Investigator Jose L. Mendez and Mary Aleman Lostaunau for the Respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on February 26, 2010. Upon notice to the parties a hearing was held on October 13, 2010 in New York, New York, before Devin A. Rice, Associate Counsel to the Board and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

The Commissioner of Labor (Commissioner or respondent) issued the order to comply with Article 6 (wage order) under review on January 27, 2010 against petitioner Diana Allaham. The wage order directs compliance with Article 6 and payment to the Commissioner for wages due and owing to claimant Maria Aleman in the amount of $350.00 for the time period from September 19, 2008 through September 24, 2008, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of $75.18, and assesses a 100% civil penalty in the amount of $350.00, for a total amount due of $775.18.

The Commissioner also issued an order under Article 19 (penalty order) assessing a $500.00 civil penalty against the petitioner for failure to keep and/or furnish true and accurate payroll records.

The petition does not challenge the civil penalties portion of the wage order or allege that the penalty order is invalid or unreasonable.

SUMMARY OF EVIDENCE

On or about October 14, 2008, claimant Mary Aleman filed a claim for unpaid wages[1] with the New York State Department of Labor (DOL) against petitioner Diana Allaham. The claim alleges that the claimant worked as a housekeeper and babysitter for the petitioner for one week and was not paid the $350.00 promised wages for such work.

The claimant testified that that she was referred by an employment agency to work as a housekeeper and babysitter at the petitioner's residence, and that the petitioner agreed to pay her $350.00 for a six day work week. The claimant testified that her daily work included cleaning the entire apartment and watching the petitioner's baby, and that her hours of work were from 8:00 a.m. to 8:00 p.m. The claimant slept at the petitioner's residence in the children's room. The claimant testified that on the last day of her work week, the petitioner informed her that she was no longer needed because the petitioner's former housekeeper was returning to work. The claimant testified that she waited around for her wages and asked the petitioner for them, but was never paid.

The petitioner testified that she "tested" the claimant out for the first day to see how she would work with the kids in the house and with the cleaning, and that she found her to be "out of breath a lot, sweating easily, and maybe it was just too much work for her." The petitioner further testified that because it was getting late, she let the claimant stay the night, and then in the morning, she terminated her. In response to several questions from the hearing officer, the petitioner estimated that the claimant worked for one day from

[1] The claim form was completed in Spanish and despite the Hearing Officer's request for respondent's counsel to provide the Board with a certified translation by October 31, 2010, no translation has ever been provided. The record reflects that the petitioner stated she did not understand the claim form because she does not speak Spanish, and the respondent's counsel was told by the hearing officer to also send the petitioner a certified translation.

approximately 10:00 a.m. to 8:30 p.m. and was terminated the following day before she started working again.

Labor Standards Investigator (LSI) Jose Luis Mendez testified that he did not investigate the claimant's claim, but had reviewed the file prior to the hearing. LSI Mendez testified that DOL sent the petitioner several letters notifying her of the claim against her. In response to DOL's correspondence, the petitioner wrote to DOL on December 17, 2008, stating that the claimant worked only four days, not five as claimed, and that the claimant refused to accept $235.00 that was offered by the petitioner as compensation.

The petitioner denied that she wrote, signed or mailed the December 17 letter, and also denied ever receiving any correspondence or notification of the claim from DOL. LSI Mendez testified that none of the correspondence sent to the petitioner was ever returned to DOL as undeliverable and that, furthermore, the correspondence was all addressed to the petitioner's residence, which address was not in dispute.

FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to the provision of Board Rules 65.39 (12 NYCRR 65.39).

The petitioner has failed to meet her burden to show that the wage order was invalid or unreasonable as required by Labor Law §§ 101, 103, and 12 NYCRR 65.30. There is no dispute that the petitioner employed the claimant to work as a housekeeper and babysitter; however, the petitioner testified that the claimant worked only one day, and not the six days claimed by the claimant and found due and owing by the order. Since the petitioner did not maintain the wage and hour records required by Labor Law § 195 and 12 NYCRR 142-2.6, the "burden of disproving the amounts sought by the Commissioner in her order rests with the employer" (*Matter of Warszycki*, Docket No. PR 08-113 [July 28, 2010]).

The petitioner testified that she did not receive any notices from DOL of the claimant's wage claim, and further testified that the claimant worked for only one day and denied that she had sent a letter dated December 17, 2008 to DOL stating that the claimant had worked four days. However, because the letter was attached to her petition, and referred to therein as her "reply to [DOL's] notice," we do not believe she did not send DOL the letter. Moreover, since the petitioner stated in her petition that she was willing to pay the claimant for the "full days that she worked (emphasis added)," we do not find the petitioner's testimony credible that the claimant worked only one day. Furthermore, we found the claimant's specific testimony of her hours and conditions of work credible. Accordingly, we find that the claimant worked for the petitioner for six days from 8:00 a.m. to 8:00 p.m., for an agreed rate of $350.00 per week, and was not compensated by the petitioner for this work.

Article 19 of the New York State Labor Law requires employers to pay live in domestic employees such as the claimant overtime pay at a rate of time and one-half the

state minimum wage for all hours worked in excess of 44 in a work week (12 NYCRR 142-2.2). The claimant in this matter worked a 72 hour week, and was therefore owed the then in effect minimum wage of $7.15 an hour for her first 44 hours of work, and $10.73 an hour for each of her 28 hours of overtime, for a total due and owing of $615.04.

For reasons that were not explained at hearing, the Commissioner issued the wage order in this matter under Article 6 of the Labor Law for only $350.00, which was the amount the claimant stated was the agreed rate of pay. This agreed rate of pay for a 72 hour work week is clearly less than required by Article 19; however, since the petitioner was not on notice prior to the hearing that she is liable for more than $350.00, we have no choice but to affirm the wage order as issued.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order to comply under Article 6 of the Labor Law dated January 27, 2010 is affirmed; and

2. The order under Article 19 of the Labor Law dated January 27, 2010 is affirmed; and

3. The petition be, and the same hereby is, denied.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office of
the Industrial Board of Appeals,
at New York, New York, on
February 7, 2011.

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