

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

-----X
 In the Matter of the Petition of: :
 :
 :
 SORAYA SAMPSON AND URBAN LEAGUE OF :
 WESTCHESTER COUNTY, INC., :
 :
 :
 Petitioners, :
 :
 :
 To Review Under Section 101 of the Labor Law: :
 an Order to Comply under Article 6 dated :
 July 13, 2009, :
 :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 :
 Respondent. :
 -----X

DOCKET NO. PR 09-202

RESOLUTION OF DECISION

APPEARANCES

Soraya Sampson, petitioner *pro se*, and for Urban League of Westchester County, Inc.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin T. Garry of counsel), for the respondent.

WITNESSES

Soraya Sampson, for petitioners; Neil Benjamin, Labor Standards Investigator, for respondent.

WHEREAS:

On July 27, 2009, Soraya Sampson and Urban League of Westchester County, Inc. (Petitioners) filed a Petition with the New York State Industrial Board of Appeals (Board), pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Board Rules) (12 NYCRR Part 66), seeking review of an Order to Comply that the Commissioner of Labor (Commissioner, Respondent or DOL) issued against them on July 13, 2009. The Order (Order) finds that Petitioners failed to pay wages to Camice S. Longwood (Claimant) for the period September 16-30, 2009, and demands payment of \$784.72 in wages; interest at the rate of 16%, calculated through the date of the Order in the amount of \$98.38; and a 100% civil penalty of \$784.72, for a total amount due as of the Order's date of \$1,667.82.

The *pro se* Petition alleges that the Claimant, a former employee, exceeded all the sick and annual leave time to which she was entitled, and that two days of wages should have been deducted from her gross wages. The Respondent filed an Answer on September 23, 2009. Upon notice to the parties, a hearing was held on July 20, 2011 in White Plains, New York before Jean Grumet, Esq., Member of 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, to make statements relevant to the issues, and to make closing arguments.

I. SUMMARY OF EVIDENCE

Testimony of Soraya Sampson

Petitioner Urban League of Westchester (Urban League) is a health and human services organization located in White Plains, New York, providing services including youth counseling, HIV/AIDs counseling, and delinquency prevention services. It has 24 employees. Petitioner Soraya Sampson, who hired and supervised the Claimant, is the Urban League's Executive Vice President and Chief Operating Officer. Claimant, a case manager who advocated on behalf of homeless students with schools and homeless shelters to obtain necessary services, worked from 9 a.m. to 5 p.m. five days per week. She was paid \$784.72 per week, \$156.94 per day, on a biweekly basis. Her last day of work was September 29, 2008; the following day she did not come to work nor did she call.

When paying Claimant for her last pay period, Urban League docked Claimant a week's pay, which at the time Petitioners believed was proper because Claimant previously had exceeded the time off allowed under the leave policy. Petitioners now acknowledge and believe it was illegal to deduct money from Claimant's earned pay because of prior offenses but believes it was proper to reduce her last paycheck by two days' pay, since she did not work two days within the pay period, September 24 and 30. The Petition mistakenly referred to September 16 rather than September 24; September 24, not 16, was the day (along with September 30) when Claimant did not come in.

Sampson testified that at the end of a payroll cycle, employees (including Claimant) filled in and submitted a pre-printed Payroll Sheet to document their daily times in and out. The pre-printed form has space for three Monday-through-Friday weeks. The last Payroll Sheet which Claimant filled in and submitted, which she signed and dated on September 29, 2008, shows her at work each weekday beginning Tuesday September 16 and ending Tuesday September 30, except for Wednesday September 24, when she is shown as absent. Employees including Claimant were also required to sign a daily sign in sheet kept by the receptionist; the daily sign in sheets for September 24 and 30, 2008 also show Claimant absent. Since Claimant did not work for two days in her last pay period, Sampson testified, Claimant was owed only three days' pay, \$470.83, not the (five day) week's pay of \$784.72 which was found due in the Order.

Sampson testified that the Urban League had a written leave policy, which was explained in an employee handbook And pursuant to this leave policy, employees received one week's annual vacation at the end of the first year of employment and thereafter, two

week's annual paid vacation. According to Sampson, Claimant, in the course of her employment of a little over a year, had taken 17 or 18 paid days off, "borrowing" against time not yet accrued.

Testimony of Neil Benjamin

The claim was investigated by the Department's Albany office. Labor Standards Investigator (LSI) Neil Benjamin testified at hearing. The Claim for Unpaid Wages filed by Claimant on October 15, 2008 (Claim) and notes taken by LSI Philip Pisani show that Claimant was hired June 13, 2007; resigned due to new employment on September 30, 2008; and received a last paycheck (in the gross amount of \$784.72) dated September 30, 2008 but indicating that it was for the payroll period ending September 15, 2008. The Claim stated that when Claimant requested her final pay (for the period September 16 through 30, 2008) on October 15, 2008, which the Claim states was the normal payday, Sampson refused and "incorrectly stated that wages were paid on 9/30/08." The Claim stated that Claimant worked 12 days during her last pay period, was paid nothing for the period, and was owed \$1569.44. Initially, Claimant and the Department believed that Claimant's last paycheck was, as stated on the pay stub, for a pay period ending September 15, 2008, and that Claimant had not been paid at all for her last two weeks of work.

Pisani's notes show that in January 2009, Petitioners provided the Department with material from which Pisani determined that the pay stub as well as Urban League's payroll journals listed pay periods incorrectly, and that the final paycheck was in fact for the pay period ending September 30, 2008. Claimant was normally paid \$1569.44 twice a month for pay periods ending on the 15th and 30th of each month; Pisani's notes confirm Sampson's testimony that Petitioners told the Department that the reason the final paycheck was for only \$784.72 (one week's pay) rather than \$1569.44 (two week's pay) was that Petitioners sought to partially recoup pay which Claimant had previously been paid for days off to which they believed she had not been entitled.

Pisani's notes reflect that he then called Claimant who stated that there was an employee handbook; that she earned sick, personal and vacation time and took one week's vacation in July 2008 on completion of her first year's employment; and that additional days off which she took for court dates in child custody litigation were all approved in advance by Petitioners, who never stated that she had exceeded her sick or personal time.

On March 12, 2009 the DOL wrote to Petitioners stating that employers "are not allowed to recoup advancements of fringe benefits from wages," and that if payment of an additional \$784.72 gross wages was not made within ten days, an Order to Comply would issue. Petitioners did not remit payment nor respond, and until after the Order was issued, gave no indication that Claimant did not work every day in her last pay period.

A "Background Information – Imposition of Civil Penalty" form signed April 30, 2009 by Senior Labor Standards Investigator Anderson recommended a 100% civil penalty which was included in the Order as issued. This document noted that the employer had operated more than three years, [d]id not pay when directed to do so" and had previously violated the Labor Law in 1998. Labor Standards Investigator Benjamin testified that penalties can range from 50% to 200% of the amount of a violation, and that the main

reason 100% was imposed in the present case was because of the employer's previous violation. Benjamin did not know the specifics of the violation. In checking DOL computer records Benjamin surmised that in 1998, the DOL found a violation against Petitioner Urban League when a worker was underpaid fringe benefits. The case was eventually settled when the employer paid \$109.40, which the DOL found due. Benjamin testified that the DOL has no further information concerning the 1998 violation, and he assumed this was the basis for the penalty in the present case.¹

II. STANDARD OF REVIEW AND BURDEN OF PROOF

In general, when a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. The petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in [the petition] shall be deemed waived" (Labor Law § 101). The Board is required to presume that an order of the Commissioner is valid (Labor Law § 103). If the Board finds that the "order, or any part thereof, is invalid or unreasonable it shall revoke, amend or modify the same" (Labor Law § 101(3)).

"The burden of proof of every allegation in a proceeding shall be upon the person asserting it" Board Rule 65.30 (12 NYCRR § 65.30). Therefore, the burden is on the Petitioners to establish by a preponderance of the evidence that the Orders issued by the Commissioner were invalid or unreasonable (State Administrative Procedures Act § 306[1]; Labor Law § 101, 103; 12 NYCRR § 65.30).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Labor Law § 191 requires that an employee such as Claimant "be paid the wages earned in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance" (§ 191[1][d]), and that "[i]f employment is terminated, the employer shall pay the wages not later than the regular pay day for the pay period during which the termination occurred" (§ 191[3]). With exceptions not here relevant, Labor Law § 193 prohibits deductions from or charges against wages. Labor Law § 195(5) requires that an employer "notify his employees in writing or by publicly posting the employer's policy on sick leave, vacation, personal leave, holidays and hours."

It is undisputed that Petitioners denied Claimant five days' pay, \$784.72, and stated that they did so to recoup pay previously provided to Claimant, to which they believed she had not been entitled pursuant to Petitioners' leave policy. Such a deduction from earned

¹ Sampson testified that she was hired by the Urban League in 1999 and did not know that there had been any prior Labor Law violation.

wages is prohibited by Labor Law § 193 (see, e.g., *Matter of Michael Fischer*, PR 06-099 [April 23, 2008]).

The Petition also asserted that two days' pay, amounting to \$313.89 gross wages, was properly deducted from the \$1569.44 to which she would normally have been entitled for her final pay period because Claimant did not work and thus did not earn pay for two days of work during that pay period. It is undisputed that Petitioners first raised this issue in the Petition, and did not mention it before the Department issued the Order which the Petition challenged.

Evidence confirms that Claimant did not work September 24 and 30, 2008. Unlike 14 other employees in the case of September 24th and 11 others in the case of September 30th, Claimant did not sign the daily sign in sheet on those days.² The Payroll Sheet which Claimant filled in and signed on September 29th also indicates that she did not work on September 24th, and while the Payroll Sheet states that she did work on September 30th, her signature on the sheet is dated 9-29-08 and Sampson's testimony that Claimant left the sheet in a supervisor's box on the 29th and did not come to work on the 30th is un rebutted. We find the evidence from Petitioners' contemporaneous records, in addition to Sampson's testimony, sufficient to rebut the statement in the Claim affirmed by Claimant that she worked 12 days during the September 16-September 30th pay period.

At the hearing, the Department pointed out that in the absence of documentary evidence including the written leave policy, which Petitioners could easily have brought to the hearing but did not, it is impossible to say that whether Claimant may have been entitled to paid time off for September 24th and 30th.

Nevertheless, the fact remains that as previously stated, the Claim affirmed by Claimant did not assert that she was entitled to be paid for approved days off during her last pay period, but that she worked and thus earned pay for 12 days during that period – an assertion we have found to be rebutted by the daily sign in sheets and Payroll Sheet. While it is possible that Claimant's failure to specifically address her entitlement to pay for two days off in September 2008 was attributable to Petitioners' not having raised the issue prior to the Petition's filing, that is speculative and is not an adequate basis to sustain the Order in this respect.

For the foregoing reasons, we modify the Order by reducing by \$313.89 the amount of wages found due and owing in the Order for the last pay period to \$470.84.

Civil Penalties for Failure to Pay Wages

Although the Petition does not specifically challenge the 100% civil penalty imposed in the Order, DOL raised the issue of the penalty at the hearing. The investigator who testified at the hearing was not the investigator who recommended the 100% civil penalty

² Neither Claimant nor any other employee signed the daily sign in sheet on September 26, 2008. Sampson testified she closed the office that day because of weather, and Petitioners did not assert that Claimant was not entitled to be paid for it.

and was unclear as to the reason for the penalty. Absent further explanation, we revoke the civil penalty.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

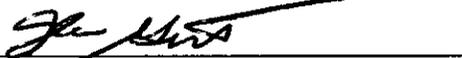
1. The Order is modified to reduce the wages due to \$470.84, to revoke the civil penalty and to recalculate the interest due based on the new principal;
2. Except as stated above, the Petition is denied.



Anne P. Stevenson, Chairperson

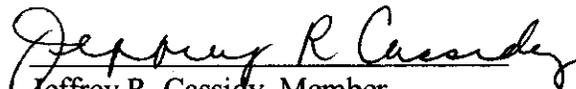


J. Christopher Meagher, Member



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
May 30, 2012.

and was unclear as to the reason for the penalty. Absent further explanation, we revoke the civil penalty.

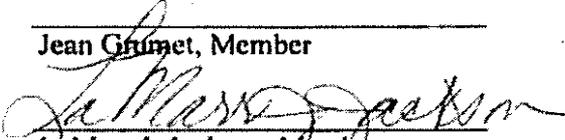
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order is modified to reduce the wages due to \$470.84, to revoke the civil penalty and to recalculate the interest due based on the new principal;
2. Except as stated above, the Petition is denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member



LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
June 4, 2012.