State of New York
Industrial Board of Appeals

Empire State Plaza
Agency Building 2, 20th Floor
Albany, New York 12223
Phone: (518) 474-4785
Fax: (518) 473-7533

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:

POWER COOLING INC.,

Petitioner,

To review under Section 101 of the Labor Law: Two (2) Orders to Comply with Article 6 of the Labor Law, dated November 18, 2005

- against -

THE COMMISSIONER OF LABOR,

Respondent.

DOCKET NO. PR-06-003

RESOLUTION OF DECISION

WHEREAS:

1. The above proceeding was commenced by the filing of a Petition for Review pursuant to Labor Law section 101 and Part 66 of the Board's Rules of Procedure and Practice (12 NYCRR Part 66) on December 28, 2005, and an Amended Petition for Review filed on January 18, 2006, to review two Orders to Comply of the Commissioner of Labor (Commissioner) issued November 18, 2005; and

2. On behalf of the Commissioner, an Answer was filed by the Respondent on March 20, 2006; and

3. Upon notice by the Board to the parties, a hearing was held before a Hearing Officer designated by the Board on July 25, 2006; and

4. Both parties were present at the hearing, were represented by counsel, and provided sufficient opportunity to present testimonial and documentary evidence, to examine and

cross-examine witnesses, and to make statements relevant to the issues raised in this proceeding; and

5. The Board having considered the pleadings, the testimony, the hearing exhibits, the documents and all the papers filed herein;

6. The Memorandum of Decision in this matter, issued the date noted below, contains the Board's findings of fact and conclusions of law and is incorporated here by reference in its entirety in this Resolution of Decision; and

7. All motions and objections made on the record of this proceeding that are not consistent with this determination are deemed denied;

NOW, THEREFORE, IT IS HEREBY RESOLVED:

1. That the first Order to Comply with Article 6, dated November 18, 2005, under review here, is affirmed.

2. That the second Order to Comply with Article 6, dated November 18, 2005, under Review here , is affirmed.

3. That the Petition and Amended Petition for Review filed here, be and the same hereby are, denied.

Anne P. Stevason, Chairman

ABSENT
Mark S. Perla, Member

Gregory A. Monteleone, Member

Susan Sullivan - Bisceglia, Member

J. Christopher Meagher, Member

Dated and Filed in the Office of the
Industrial Board of Appeals,
at Albany, New York,
on August 22, 2007

State of New York
Industrial Board of Appeals

Empire State Plaza
Agency Building 2, 20th Floor
Albany, New York 12223

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
POWER COOLING INC.,	
Petitioner,	
To review under Section 101 of the Labor Law: Two (2) Orders to Comply with Article 6 of the Labor Law, dated November 18, 2005	DOCKET NO. PR-06-003
	MEMORANDUM OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

The Petition for Review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on December 28, 2005, and an Amended Petition was filed on January 18, 2006. Petitioner, Power Cooling Inc. (Power Cooling), seeks to vacate two Orders to Comply with Article 6 of the Labor Law issued to Petitioner on November 18, 2005 by the Respondent Commissioner of Labor (Commissioner). An Answer to the Amended Petition was filed on March 20, 2005. Upon notice to the parties, a hearing was held on July 25, 2006, before John G. Binseel, then Deputy Counsel to the Board and designated Hearing Officer in this proceeding.

Petitioner was represented at the hearing by its attorney, Noel W. Hauser, Esq., and Respondent by Maria Colavito, Counsel for the Department of Labor (DOL), Benjamin T. Garry of Counsel. Each party was afforded full opportunity to present documentary evidence, to examine witnesses and cross-examine witnesses, and to make statements relevant to the issues. In accordance with arrangements made at the conclusion of the hearing, both counsel filed post-hearing memoranda.

Respondent's first Order to Comply directs compliance with Section 191 of Article 6 of the Labor Law (failure to pay wages earned or payable) and directs payment to the Commissioner for

wages due and owing to claimant Joseph Natland in the amount of $960.00, for the time period March 24, 2003 to March 27, 2003, with interest continuing thereon in the amount of $406.51 at the rate of 16% calculated to the date of the Order, and assessing a civil penalty in the amount of $240.00, for a total due of $1,606.51.

The second Order to Comply directs compliance with Section 198-c of Article 6 of the Labor Law (failure to pay or provide benefits or wage supplements) and directs payment to the Commissioner for wage supplements due and owing claimant Joseph Natland in the amount of $3,600.00, for vacation for the period March 23, 2002 to March 23, 2003, with interest continuing thereon in the amount of $1,524.42 at the rate of 16% calculated to the date of the Order, and assessing a civil penalty in the amount of $900.00, for a total due of $6,024.42

The Board having given due consideration to the testimony, documentary evidence, and all the papers filed herein, makes the following findings of fact and law pursuant to the provisions of Board Rule 65.39 (12 NYCRR 65.39).

FINDINGS OF FACT

The Petitioner, Power Cooling Inc., is an air conditioning, heating and ventilation installation and service company located in Queens, New York. It is a private employer doing business in the State of New York, as defined by Article 1 of the Labor Law, and is subject to the jurisdiction of the Commissioner . It is also an employer as defined in Labor Law § 651.6

Claimant, Joseph Natland, testified at the hearing that he worked as an air conditioning mechanic for Power Cooling from March 23, 1987 until March 27, 2003. Both claimant, and a supervisor of claimant's department called by Petitioner, testified that some 80% of claimant's duties involved manual labor, with the other 20% computer work, programming control systems. In or about early March 2003, claimant found another job and gave Petitioner two weeks notice, along with his resignation. Claimant credibly testified that on Thursday, March 27, 2003, the day before what was to be his final day of work, he was called into the President's office and terminated for allegedly failing to return company tools and equipment. Claimant was not paid for his last four days of work, from March 23, 2003 to March 27, 2003, and for accrued vacation credit he believed was owed him over the prior two years. He filed complaints against Petitioner with DOL for such unpaid wages and benefits on June 20, 2003.

Ronald Coaxum, Labor Standards Investigator with the DOL, testified concerning the DOL investigation that resulted in the Order to Comply at issue herein. After receiving the complaints, DOL issued Petitioner a "collection letter". The letter notified Petitioner that the unpaid wages claimed were initially calculated at $960.00 for the period March 24, 2003 to March 27, 2003, and the unpaid vacation at $8,400.00 for the period March 23, 2001 to March 27, 2003. The letter requested that Petitioner remit payment for such sums to DOL if it agreed with the claim, but if it disagreed, then to identify the reasons why, and provide copies of all payroll records, company policies, contracts, etc., to substantiate its position.

In response to the collection letter, Petitioner, by its attorney, did not dispute either the amounts or the period of the unpaid wages and vacation. Instead, it stated that no money was owed claimant because he had removed thousands of dollars worth of valuable tools and equipment without authorization from his employer, for which he was discharged. DOL then informed Petitioner by letter that Labor Law § 193.1 prohibits deductions from wages that are not both

authorized in writing by and for the benefit of the employee; that allegations of wrongdoing are to be settled in the courts, not through violations of the Labor Law depriving employees of earned wages and benefits that are claimed due; and that in the absence of evidence to the contrary, the unpaid wages and benefits it had calculated should be remitted to DOL. Petitioner thereafter submitted to the investigator a copy of its Employer Fringe Benefit policy signed by claimant on March 23, 1987, payroll records for the period 2001-2003, a schedule of vacation/sick days that claimant took in 2002-2003, and a breakdown of tools allegedly taken by claimant.

After receiving the additional records from Petitioner, DOL's investigator recalculated the amount of vacation owed the claimant. The investigator credibly testified that the company policy provided for employees with more than six years of service to receive three weeks of vacation per year. Despite a provision that vacation time cannot be cumulative from one year to the next, i.e. employees must "use or lose" the new three weeks vacation they accrue each year on their hiring anniversary date during the course of the next year, this did not mean that claimant would not have accrued three weeks vacation on the anniversary date preceding his termination, for which he should be paid. Since DOL determined that claimant's yearly anniversary date was March 23rd, based on his signing the company policy on March 23, 1987, claimant had three weeks vacation due him on his termination on March 27, 2003. This was recalculated to be three times claimant's weekly salary of $1,200.00 per week, for a total of $3,600.00.

At the hearing, Petitioner asserted through the testimony of its President that claimant would be owed nothing in vacation credit because any unused time from the prior year would disappear on the following year's anniversary date. Further, the vacation/sick days' records showed that claimant had used some 88 hours vacation in the prior year. We find DOL's construction of the company vacation policy rational and reasonable, particularly in light of the provision on payment for unused vacation credit on termination, which shows that the annual three weeks is awarded prospectively on each new anniversary. This makes claimant's use of vacation time in the prior year beside the point, as DOL's investigator reasonably testified. Moreover, our finding on this point is reinforced by Petitioner's waiver of any objection to this issue by its post-hearing memorandum, as we note below.

As to the unpaid wages claim, we credit the testimony of DOL's investigator and the claimant over that of the Petitioner's President. The investigator testified that DOL's final determination that claimant was owed four days' salary, in the amount of $960.00, for the period of March 24, 2003 to March 27, 2003, was based on claimant's statement to the DOL investigator during the investigation that he worked those four days, and because Petitioner did not dispute this period of employment in its initial response to the collection letter. Petitioner suggested on cross-examination that its payroll record did not show that claimant had worked those days. However, the investigator testified that the record did not establish that claimant had not worked, but only that he was not paid for those days.

Petitioner also spent much time at the hearing asserting through the testimony of its President, cross-examination of the claimant, and submission of a timesheet signed by claimant, with the last workday entered as March 21, 2003, that claimant was terminated on the latter day and was therefore not employed for the unpaid wage period determined by DOL. However, we find such claim not credible. Claimant testified that the timesheets were submitted at the end of the five day week and he was deprived of the opportunity to turn one in by having been fired the day before. Petitioner also did not submit the timesheet to DOL during its investigation. It was first produced at

the hearing. Again, our finding is reinforced by Petitioner's waiver of objection to this issue by its post-hearing memorandum, noted below.

Petitioner's Amended Petition, filed with the Board on January 18, 2006, raised two objections to DOL's Orders: (1) a general objection that claimant had received everything to which he was entitled in the way of wages and other benefits; and (2) that claimant was not covered by Article 6 of the Labor Law because at all times he was a supervisor and administrative employee.

At the hearing, the supervisor of claimant's department, Paul Senum, and its President, Lauren Larsen, testified for the Petitioner. Petitioner's witnesses testified that claimant was considered a supervisor by virtue of his salary step and because he taught co-workers how to perform on-the-job tasks. Also through the testimony of both witnesses, direct and cross-examination of the claimant, and submission of an updated list of tools and equipment allegedly removed by claimant without authorization, for which he was terminated, Petitioner seeks a finding from the Board that claimant did in fact commit such misconduct.

Petitioner asserted at the hearing, and in its post-hearing memorandum, that Labor Law § 196(1)(a) authorizes the Commissioner to "attempt to adjust equitable [sic] controversies between employers and employees" relating to Article 6. Petitioner argued that since claimant did in fact commit misconduct costing Petitioner thousands of dollars, the Commissioner's Orders are inequitable and therefore unreasonable.

While not conceding the relevance of Petitioner's evidence of misconduct, DOL sought to rebut such allegations. As noted above, DOL also established through claimant and Mr. Senum that 80% of claimant's duties were manual, and 20% computer programming. It further established through claimant's testimony, without contradiction from Petitioner, that claimant had no duties involving discipline, approving leave, or the direct supervision of his two co-workers.

In its post-hearing memorandum, Petitioner waived all previous objections to DOL's Orders, except that based on claimant's alleged misconduct:

> Labor Law Section 196-A empowers the Commissioner to deal equitably in dealing with claims asserted between employer and employee. Power Cooling admits that but for the claimant's transgressions, he would be entitled to his last week's wages as well as vacation pay for the last year during which he was employed.

By virtue of Petitioner's post-hearing concession, the Board need not decide Petitioner's objection over the supervisory/administrative issue. We note that the Petitioner's proof on the issue was vague and conclusory and in any event, would not overcome DOL's specific and credible evidence that claimant did not perform supervisory or administrative duties sufficient to exempt him from coverage under Article 6. And as described above, Petitioner's other challenges at the hearing to DOL's determination of the unpaid wages and vacation due, also now waived, did not overcome DOL's otherwise coherent and reasonable determination of what is owed to the claimant based on a logical extrapolation of company policy.

For the reasons stated below, Article 6 does not permit Petitioner to withhold wages or wage supplements otherwise owed to employees on the grounds of employee misconduct. We therefore

do not make any factual findings as to whether, based on this record, the claimant herein did or did not engage in the misconduct for which he was terminated

CONCLUSIONS OF LAW

1. Standard of Review

The Board reviews the validity and reasonableness of an Order of Compliance made by the Commissioner of Labor pursuant to Labor Law section 101, which requires the filing of a Petition specifying the Order,

> "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections...not raised in the [the Petition] shall be deemed waived."

When reviewing such an Order, the Board shall presume that the Order is valid. Labor Law § 103.1 provides in relevant part:

> "Every provision of this chapter and of the rules and regulations made in pursuance thereof, and every order directing compliance therewith, shall be valid unless declared invalid in a proceeding brought under the provisions of this chapter."

Furthermore, pursuant to Board Rules of Procedure and Practice (Rules) § 65.30,

> "the burden of proof of every allegation in a proceeding shall be upon the person asserting it."

The burden of proof is therefore on the Petitioner when seeking review of an Order of Compliance to prove that the Order is not valid or reasonable.

2. Employer's Failure to Pay Wages and Wage Supplements

Labor Law section 193 prohibits an employer from deducting any sum from an employee's wages, with limited exceptions not present in the instant case. Labor Law section 190.1 defines "wages" as including benefits or wage supplements as defined in Section 198-c, including "vacation" pay, delineated in Section 198-c(2).

Section 193 specifically provides:

> "1. No employer shall make any deductions from the wages of an employee, except deductions which:
>
> a. are made in accordance with the provisions of any law or any rule of any governmental agency; or
>
> b. are expressly authorized in writing by the employee and are for the benefit of the employee; provided that such authorization is kept on file on the employer's premises. Such authorized deductions shall

> be limited to payments for insurance premiums, health and welfare payments, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee."

Based on the statutory prohibition against "self help" measures, courts have routinely found employer deductions from wages that are outside the boundaries of the statutory exceptions unlawful. *See Hudacs v. Celebrity Limousine Service Corp.*, 205 AD2d 155 (3d Dept 1994) (illegal to take deductions for clothing, umbrellas, maps, and parking tickets from chauffeurs' wages); *Guepet v. International Tao Sys., Inc.*, 110 Misc 2d 940, 941 (Sup Ct Nassau County 1981) ("Nowhere does [section 191] permit an employer to make contemporaneous deductions from wages because an employee failed to perform properly"); *Maggione v. Bero Constr. Corp.*, 106 Misc 2d 384 (Sup Ct Seneca County 1980) (improper for an employer to withhold money from an employee that may be due employer on a counterclaim).

Petitioner's reliance on the Commissioner's discretionary power under Labor Law §196(1)(a) to excuse its otherwise unlawful deductions from claimant's wages in this case is misplaced. The statute does afford the Commissioner discretion during the investigatory phase of a controversy under Article 6 to adjust or settle disputes. However, the provisions of section 193 prohibiting wage deductions outside its exceptions are mandatory. Finding that Petitioner violated the statute by making deductions from claimant's wages upon a ground that is not encompassed within the statute, the Commissioner is powerless to exercise her discretion to excuse the violation for a reason not listed. To do so would override the Legislature and write into the statute another exception for employee misconduct that the Legislature did not see fit to provide

For the above reasons, we reject Petitioner's objection to the Commissioner's Orders as being invalid or unreasonable. Petitioner's actions in withholding wages and wage supplements owing the claimant because he allegedly engaged in misconduct violated Labor Law sections 191 and 198-c, and the Commissioner's Orders to Comply based on such violations are valid and reasonable in all respects.

3. Civil Penalties For Failure To Pay Wages

The first Order for $960.00 in unpaid wages assessed a civil penalty of 25% in the amount of $240.00. The second Order for unpaid vacation also assessed a penalty of 25% in the amount of $900.00. We find the Commissioner's assessment of civil penalties in the amounts set forth in the Orders proper and reasonable in all respects

4. Interest

Labor Law section 219 provides that when the Commissioner determines that wages are due, the Order directing payment shall include "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 form the date of the underpayment to the date of payment". Section 14-A of the Banking Law sets the "maximum rate of interest" at "sixteen percent per annum". We find the Commissioner's assessment of interest in the amounts set forth in the Orders proper and reasonable in all respects.

The foregoing constitutes our findings of fact and law pursuant to Board Rule § 65.39.

Let a Resolution of Decision issue accordingly.

Anne P. Stevason, Chairman

ABSENT
Mark S. Perla, Member

Gregory A. Monteleone, Member

Susan Sullivan - Bisceglia, Member

J. Christopher Meagher, Member*

Dated and Filed in the Office of the
Industrial Board of Appeals,
at Albany, New York,
on August 22, 2007