

The Order to Comply under review herein, was issued on March 10, 2006 and directs compliance with § 191 of Article 6 of the Labor Law (failure to pay wages earned). The Order also directs payment to the Commissioner of Labor, for wages due and owing to two (2) named Claimants in the combined amount of \$9,000.00, during various time periods, with combined interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of \$1,163.83, and assessing a civil penalty in the amount of \$2,250.00, for a total due of \$12,413.83.

The Respondent by motion requested that the claim of one of the Claimants (Wesockes) be removed from the Order, as a result of settlement between the Petitioner and Claimant, whereby Claimant has rescinded his claim, and that the Order be revised accordingly. Based on stipulation between the parties at hearing that the Order be so revised, the motion was granted. The Order as revised directs payment to Claimant (Asinoff) in the amount of \$6,000.00, for the period February 1, 2005 through April 28, 2005, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of \$831.12, and assessing a civil penalty in the amount of \$1,500.00, for a total due of \$8,331.12.

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

FINDINGS OF FACT

The Petitioner 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 of Labor. It is also an employer as defined in Labor Law § 651.6.

Petitioner is a small parochial school that employs part time teachers on a flat salary basis. One of the teachers, Mitchell Asinoff, is the Claimant in this matter.

Petitioner's witness, (Rabbi Moshe Aharonov) is the founder and dean of the school. He testified regarding certain criminal acts by certain individuals employed at the school, including physical damage to school property and a letter sent out to parents that caused a drop in tuition payments. He stated that he believed Asinoff was partially responsible for the school's financial losses and therefore did not paid him his salary. On cross-examination, Aharonov testified that the Petitioner uses a payroll company to process payroll, and that teachers were paid a regular salary on a monthly basis, between the 10th and 15th of each month. He stated that Claimant was paid his regular salary until May of 2005. In May of 2005, Aharonov directed the payroll company to stop payment on Claimant's salary. Also, on re-direct, Aharonov stated that Petitioner paid for certain holidays, but Claimant was not be entitled to any pay during the Passover holiday.

The Department of Labor's (DOL) senior investigator (Frank King) testified that he was involved with the investigation of the Claimant's wage claim. He stated that during the investigation, Petitioner informed him that Asinoff was not entitled to his pay because he was involved in criminal actions, and owed the Petitioner compensation. He stated that Asinoff's was owed a salary of \$2,000.00 a month, for three months. King testified that Petitioner provided

him with a copy of a check, in the amount of \$1,546.03, representing Claimant's salary one month's net pay, for the period February 1st through February 28th, 2005. King was told by Petitioner that this check was not issued to the Claimant due to the contentions made. In addition, the investigator stated that the portion of the claim period covering the Passover holiday was included in the wage amount since wages were paid on a flat salary basis and the employer stated that they customarily pay for the Passover holiday. King also testified that at the end of his investigation, he made a recommendation that a twenty-five percent civil penalty be imposed, based on consideration of several factors, established according to standard protocols within the division, including the size of the entity and past violations issued. He stated that it appeared that Petitioner did not have any past violations.

The Claimant (Mitchell Asinoff) testified that he was employed by Petitioner during the claim period and was terminated on May 2, 2005, after he filed his wage claim. Asinoff stated that, on his wage claim, he had listed April 14, 2005 as his last day of work because it was the last day prior to the Passover holiday, April 14th through May 4th or 5th. Asinoff testified that, although he was not working during the holiday period, his understanding was that he was to be paid a flat salary of \$2,000.00 for that month. He stated that the last paycheck he received from Petitioner was for the pay period ending January 30, 2005, and that he was claiming wages for the subsequent three months that he had worked for Petitioner. On cross-examination, he testified that he was accused by Aharonov of participating in certain incidents, along with other employees, and that he tried to assure Aharonov, to no avail, that he was not involved in any of the incidents. He also testified that he reported to work after the holiday break without any knowledge of the incidents that occurred prior to his return.

STANDARD OF REVIEW

In general, the Board reviews the validity and reasonableness of an Order to Comply made by the Commissioner upon the filing of a Petition for Review. 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].

When reviewing an Order to comply issued by the Commissioner, 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."

Pursuant to Board Rule 65.30: "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioner to prove that the Order under review is not valid or reasonable.

EMPLOYER'S FAILURE TO PAY WAGES

An employer's obligation to pay the wages is found in the Labor Law § 191, at Article 6.

Section 191(1) provides, in pertinent part:

“Every employer shall pay wages in accordance with the following provisions:

a. A manual worker shall be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned; provided however that a manual worker employed by an employer authorized by the commissioner pursuant to subparagraph (ii) of this paragraph or by a non-profitmaking organization shall be paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly.

...

d. A clerical and other worker shall 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 by the employer...”

Section 191 (3) further provides:

“If 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, as established in accordance with the provisions of this section...”

Along with the issuance of an order directing compliance, the Commissioner is authorized to assess a civil penalty and interest, in addition to or concurrently with any other remedies or penalties provided under the Labor Law, based upon the amount determined to be due and owing. Section 218 provides, in pertinent part:

“1. ... In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements found by the commissioner to be due, plus the appropriate civil penalty.... In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements.

....

4. The civil penalty provided for in this section shall be in addition to and may be imposed concurrently with any other remedy or penalty provided for in this chapter.”

Turning to the facts of the instant case, the Order to Comply, based on a violation of Article 6 of the Labor Law for failure to pay wages, should be affirmed in its entirety.

It is undisputed that the Claimant was employed by Petitioner from November, 2004 to May, 2005, and that he was not paid his flat monthly salary of \$2,000.00 a month, for a period of three months, February, 2005 through May, 2005. The Claimant's testimony regarding his salary and the time that went unpaid was credible, and was confirmed by the Petitioner's witness. The Petitioner's sole reason for non-payment of Claimant's salary was that Claimant had committed certain wrongful acts, and because these acts resulted in financial loss to the Petitioner, Claimant was not entitled to his pay. Despite Petitioner's extensive testimony regarding the several incidents that took place at the Petitioner's school and the purported involvement of Claimant in these incidents, the Petitioner has wholly failed to show, nor can we find, any basis in law authorizing an employer to withhold an employee's wages, whether due to an employee's misconduct or wrongdoing, or any other basis in law. Absent a showing by the Petitioner that the non-payment of Claimant's wages was valid under the §191 of the Labor Law, the Commissioner's Order should be affirmed. *See also, Angello v. National Finance Corp* 1 AD3d 850, 769 NYS2d 66 (3rd Dept 2003).

In addition, the Board notes that the Labor Law does not authorize "self-help" remedies like the one used by Petitioner in the instant matter. "Unless authorized by law or by consent, an employer is not permitted the self-help remedy of withholding employees' compensation." *P & L Group v Garfinkel* 150 AD2d 663, 664, 541 NYS2d 535 (2nd Dept 1989). Pursuant to Labor Law §193, an employer is clearly prohibited from taking any deductions from an employee's wages, except those expressly authorized by, and for the benefit of, the employee. Labor Law §193 (1)(b) limits those deductions "for the benefit of the employee to include payments for insurance premiums, pension or health and welfare benefits, 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." Clearly, Petitioner's self-help remedy of withholding Claimant's wages due to the Claimant's alleged misconduct, is not, in any respects, an expressly authorized deduction as contemplated by Labor Law §193. Therefore, we cannot find any valid basis under the Labor Law for Petitioner's non-payment of wages to the Claimant. Since Labor Law §191 requires the payment of wages when due, the Commissioner's Order is valid and reasonable, and should be affirmed.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Order additionally assessed 25% of the unpaid wages in civil penalties. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalty amount set forth in the Order is proper and reasonable in all respects.

INTEREST

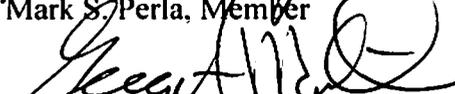
Labor Law § 219 provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment. Banking Law section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

NOW, THEREFORE, IT IS HEREBY RESOLVED:

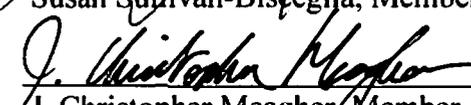
1. That the Order to Comply with §191 of Article 6 of the Labor Law, dated March 10, 2005, under review herein, is affirmed.
2. That the Petition for Review filed herein, be and the same hereby is, denied.


Anne P. Stevason, Chairman


Mark S. Perla, Member


Gregory A. Monteleone, Member


Susan Sullivan-Bisseglija, Member


J. Christopher Meagher, Member

Dated and Filed in the Office of the
Industrial Board of Appeals,
at Albany, New York,
on October 24, 2007.

KHG