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Jean Grumet
Members



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

Sandra M. Nathan
Deputy Counsel

Devin A. Rice
Associate Counsel

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

URBAN RENEWAL COMMITTEE OF :

SOUTH JAMAICA, INC., :

Petitioner, :

: DOCKET NO. PR-06-027

To review under Section 101 of the New York State :

Labor Law: An Order to Comply with Article 6 of :

the Labor Law dated April 7, 2006, : RESOLUTION OF DECISION

: -against- :

THE COMMISSIONER OF LABOR, :

Respondent. :

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WHEREAS:

The petition in this case was filed with the Industrial Board of Appeals (Board) on May 8, 2006, seeking review of an Order to Comply with Labor Law article 6 (Order) that the Commissioner of Labor (Commissioner) issued against the Petitioner Urban Renewal Committee of South Jamaica, Inc. (Petitioner), on April 7, 2006. The Order finds that the Petitioner failed to pay wages of \$874 to a former employee (Claimant) for the period April 21, 2003 to May 23, 2003 and directs Petitioner to pay that amount, along with \$401.89 in interest at 16 % per annum from the date of the Order and \$220 for a civil penalty, for a total amount of \$1,495.89 due.

Petitioner asserts that it is a not-for-profit corporation that is dependent upon state funds for its existence; that it had a contract with a program of the Department of Labor (DOL) pursuant to which the Petitioner was to provide certain services; that Petitioner and DOL had a dispute regarding the reimbursement of Petitioner for expenditures incurred pursuant to their contract; and that Petitioner and DOL had agreed that the Petitioner would

pay the Claimant a specific and previously agreed-upon amount when their dispute was resolved. The Commissioner filed an answer that denied the petition's material allegations and asserted that the petition should be dismissed as failing to comply with § 66.3 of the Board's Rules of Procedure and Practice (Rules) which governs the form and content of a petition.

On notice to the parties, a hearing was held on April 10, 2007 in the Board's New York City office before then Board Member Gregory A. Monteleone, Esq. The Petitioner appeared by its former Executive Director Ineze Patterson, and Respondent Commissioner was represented by Maria L. Colavito, Counsel to DOL, Benjamin T. Garry of counsel. Each party was afforded a full opportunity to present evidence, to examine and cross-examine witnesses, and to make arguments relevant to the issues raised. At the conclusion of the hearing the record was left open, upon the parties' agreement, to receive additional documentary evidence that both parties submitted.

SUMMARY OF RELEVANT EVIDENCE

The Petitioner's sole witness was Glenda Harrington, the Claimant's former supervisor. The Claimant and Labor Standards Investigator Alin Lobl were witnesses for the Commissioner.

DOL's Division of Labor Standards received the Claimant's claim for unpaid wages on October 31, 2003. The claim alleges that Claimant worked for Petitioner for 40 hours per week and was due \$1,350 in unpaid wages for the workweeks ending April 25, May 2, May 9, May 16, and May 23, 2003. A letter dated October 20, 2003 and signed by the Claimant was annexed to the claim; it states that the last paycheck that Claimant had received from Petitioner was on May 2, 2003 for \$250 with "Emergency Payroll" noted on the stub and that the Petitioner "closed down on May 30, 2003."

It is undisputed that the Claimant worked for Petitioner for between six months and a year; was an employee of the Petitioner; earned wages at the rate of \$8.00 an hour; and that the Petitioner paid its employees' wages by check on a bi-weekly basis.

Claimant testified that her last day of employment was May 30, 2003; the information contained in the claim that she filed with DOL was accurate; and that the \$250 "emergency payroll" check dated May 2, 2003 was insufficient because it did not cover the entire two-week period that she worked. Payroll documents that Petitioner produced established that the \$250 "Emergency Payroll" payment was a partial payment toward \$560 in wages earned during the period April 7 – April 18, 2003, and not a payment for earnings within the claim period upon which the Order is based.

Petitioner's employees submitted biweekly time sheets and progress reports on their daily work as part of the payment process and received pay stubs along with their paycheck, for which they were required to sign acknowledging receipt of payment. As Claimant's supervisor, Glenda Harrington collected Claimant's time sheets, checked their accuracy as to dates worked, and signed off on them.

Newspaper articles in evidence indicate that Petitioner had longstanding problems with the conditions at its offices, including lack of heat, and was unable to resolve these problems with its landlord. Harrington testified that the Petitioner's office was closed down during May 2003 because of continuing poor working conditions and work hours were reduced. She stated that May 2, 2003 was the last day that employees did their normal job assignments and was the last time that employees were paid. Harrington continued that after May 2, employees including the Claimant were packing boxes for storage and to move the office's contents, but that they were working only one to two days a week. In contrast, Claimant testified that she continued to do her job during May although she did not state the number of hours that she worked each week.

Weekly time sheets signed by the Claimant that were received into evidence from DOL after the hearing show that as of May 30, 2003, the Petitioner closed its operations and that Claimant's regular workweek during the weeks ending May 9, 23, and 30, 2003, was 35 hours although she actually worked an hour or slightly more in each of these weeks, but never as much as 37 hours a week. Similarly, weekly time sheets signed by the Claimant that Petitioner submitted to evidence after the hearing show that Claimant's regular workweek during the weeks ending April 25 and May 2, 2003 was 35 hours; that she actually worked an hour or so more during these weeks, but never as much as 37 hours a week; and that during the weeks ending March 11 and 28 and April 4, 2003, Claimant worked 36, 29, and 0 hours respectively. Finally, Petitioner submitted to evidence post-hearing an August 12, 2002 memorandum that Claimant had signed which states that "[a]ll staff are to report to work from 9:00 a.m. to 5:00 p.m. each day." All of Claimant's signed time sheets show that she took at least an hour's lunch each work day.

Investigator Lobl testified that following receipt of Claimant's claim, on July 13, 2004 DOL issued a collection letter to the Petitioner, advising that if it did not agree that the Claimant was due \$1,350, it should provide DOL with "a full statement. . . giving your reasons [and] include a copy of any payroll record, policy, contract, etc. to substantiate your position."

On March 28, 2005, Lobl visited the Petitioner in order to try to collect on the wage claim. He spoke with Patterson who, according to Lobl, said that the Claimant had not worked for the Petitioner during the claim period April 21-May 23, 2003. Lobl advised that unless Petitioner either paid the wages claimed or provided proof of Ms. Patterson's contention, an order to comply would be issued against it.

An April 19, 2005 inter-office memorandum from Harrington to Patterson, which the Commissioner introduced into evidence, states that on May 15, 2003, the Claimant was paid gross wages of \$560 for the period April 21 through May 2, 2003 and refers to an attached copy of a check and receipt with the Claimant's signature; however the attachments were not part of the exhibit that the Commissioner introduced into evidence. The April 19 memorandum also states that the Claimant worked a 35-hour week and not a 40-hour week as stated on the wage claim filed with DOL and that she worked packing for about six and a half hours on May 15, 2003.

Lobl testified that a “narrative” by Ronald Coaxum, a supervisor in DOL’s Labor Standards Division, apparently a part of DOL’s file, states that the Claimant corroborated her receipt of the \$560 referred to in Harrington’s April 19 memorandum and that in reliance on that information, DOL reduced the amount of wages due the Claimant to \$874. (The record contains no explanation of the calculation used to reduce the claim from \$1,350 to \$874 by relying on a payment of \$560 and/or a reduction in the number of weekly hours worked.)

The Claimant testified that she did not recall receiving the \$560 payment for her two workweeks from April 21 to May 2, 2003. However on cross-examination, she was shown payroll documents for that period and conceded that her signature appeared on them, acknowledging receipt of \$560 in wages on May 16, 2003.

The Commissioner also introduced into evidence a June 10, 2005 letter from Patterson to Coaxum. In it she appears to acknowledge that the Claimant is due a payment and states that “anticipated funds . . . have been held up longer than projected because of an IRS Notice of Levy” and that Petitioner is working to avoid the levy and resolve the issue concerning the Claimant.

Lobl testified that on January 3, 2006, he forwarded the matter to his supervisor to issue an order because he had not received from Petitioner either payment of the wages or evidence that the wages were not due. On the DOL form “Background Information -- Imposition of Civil Penalty,” dated January 3, 2006, a box is checked under a section entitled “Good Faith of Employer,” indicating that the Petitioner “did not provide records, and ignored correspondence. Employer did not remit payment as per District Meeting.” The form also indicates that Petitioner owes \$874 and that Lobl recommended that a 25% penalty be assessed. Lobl testified that a 25% penalty was assessed because the Petitioner did not cooperate with DOL’s investigation.

FINDINGS

The Board has considered the pleadings, hearing testimony and documentary evidence accepted into the record and makes the following findings of fact and law pursuant to the provision of Rule 65.39 (12 NYCRR 65.39).

In general on appeal, the Board reviews whether the Commissioner’s order is valid and reasonable (Labor Law § 101), taking into consideration the statutory presumption that an order of the Commissioner is valid (Labor Law § 103[1]). Pursuant to Rule 65.30 (12 NYCRR 65.30), “[t]he burden of proof of every allegation in a proceeding shall be upon the person asserting it.” Therefore, the burden is on the Petitioner here to prove that the Order under review is not valid or reasonable.

Wages.

At the outset, we find that Petitioner failed to prove the claim asserted in the petition that it and DOL had agreed that the Petitioner would pay the Claimant a specific previously agreed-upon amount when their contract dispute was resolved. The record is entirely devoid of evidence supporting this claim.

Next, we note that based on the evidence that Claimant had been paid for her work from April 21-May 2, 2003, the Commissioner's attorney amended the Order on the record by eliminating that time frame from the period for which wages were found to be due from the Petitioner. Accordingly, the only period remaining in issue under the Order are the three workweeks from May 5 – May 23, 2003. Petitioner has the burden to show that the Order is unreasonable either because the Claimant did not work during this time and is therefore not owed the wages, or because Petitioner has already paid the wages for these three weeks. Petitioner has failed to prove either basis for finding the Order unreasonable.

We find that the evidence establishes that Claimant worked these three weeks despite Petitioner's contention that she either did not work at all, or worked only reduced workweeks. Petitioner failed to offer any records of the hours the Claimant worked these weeks, although an employer is required to maintain its employees' payroll records including time worked and wages paid (Labor Law § 661). The Petitioner's own April 19, 2005 interoffice memorandum belies any assertion that the Claimant did not work during this time frame as it confirms that the Claimant worked on May 15, 2003. Further, Harrington's testimony that Claimant worked a reduced workweek is outweighed by the evidence to the contrary. The Claimant's testimony, the claim filed with DOL, and copies of Petitioner's own weekly time records for the weeks May 5-9 and May 19-23, 2003, which the are signed by Claimant, establish that Claimant worked three full workweeks between May 5 and May 23, 2003. The Board is entitled to credit the Claimant's assertions in the absence of adequate employer records. Labor Law § 196-a; *Angello v Nat. Fin. Corp.*, 1 AD3d 850, 854 (3d Dept 2003); *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 (3rd Dept. 1989).

While Claimant alleged that her regular workweek was 40 hours, we find that her workweek was only 35 hours although she did at times work an hour or so more a week. Our finding is based on her signed weekly time sheets for five workweeks during the period April 21-May 30, 2003, which expressly state that her regular workweek was 35 hours, and her signed weekly time sheets for eight workweeks during the period March 7-May 30, 2003 that show that she never worked more than about 36.5 hours a week. The April 19, 2005 Harrington memorandum, which the Commissioner introduced into evidence and upon which the Commissioner relied in reducing Claimant's original claim from \$1,350 to \$874, also supports this finding. In it, Harrington states that the Petitioner's workweek was 35 hours and, further, notes that the Claimant was paid \$560 for 70 hours of work during the two workweeks from April 21 - May 2, 2003. As it is undisputed that Claimant was paid \$8 per hour, and as the division of 560 by 8 yields 70 hours for two weeks, Petitioner's contention that Claimant's regular workweek was 35 hours must be credited.

The Petitioner introduced no records or other evidence that Claimant was paid for the work that she performed during the three weeks between May 5 and May 23, 2003. Labor Law § 196-a provides that “[f]ailure of an employer to keep adequate records . . . shall not operate as a bar to filing a complaint by an employee. In such a case the employer in violation of [Labor Law article 6] shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements.” Having failed in its burden to prove that the Claimant was paid for the at-issue period, Petitioner owes the Claimant wages for the three workweeks from May 5 - May 23, 2003 at \$8 per hour for the hours shown in the Claimant’s weekly time sheets for the workweeks ending May 9 and 23, 2003 and for 35 hours of work for the workweek ending May 16, 2003 for which there is no weekly time sheet in evidence.

Civil penalties.

When the Commissioner determines that an employer has violated article 6 of the Labor Law, she is required to issue a compliance order to the employer that includes a demand that the employer pay the total amount found to be due and owing. Labor Law § 218 (1) provides, in pertinent part:

“If the commissioner determines that an employer has violated a provision of article six (payment of wages) . . . 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.”

The Commissioner is also authorized to assess a civil penalty and interest based on the amount of wages found owing. The civil penalty is in addition to, or concurrent with, any other remedies or penalties provided under the Labor Law (Labor Law § 218 [4]). In this regard, Labor Law § 218 (1) provides:

“In no case shall the order direct payment of an amount less than the total wages . . . 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 . . . the failure to comply with recordkeeping or other non-wage requirements.”

The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of the civil penalty amount in the Order is proper and reasonable in all respects. However, in light of the Board’s determination that the Commissioner shall recalculate the amount of the wages due the Complainant so as to be consistent with the Board’s findings here, the Board finds that the amount of civil penalty shall be similarly modified so as to be 25% of the recalculated wages.

Interest.

Labor Law § 219 (1) 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." In light of the Board's findings, the amount of the interest shall be recalculated based on the recalculated wages that the Board directs here.

Conclusion.

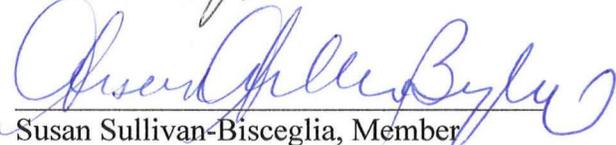
All motions, claims, and objections that are part of the record, not otherwise addressed in this Resolution of Decision, and inconsistent with the Board's determination here are denied.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order to Comply with Article 6 of the Labor Law, April 7, 2006 is affirmed as modified consistent with this decision; and
2. The Petition for Review be, and the same hereby is, denied.



Anne P. Stevason, Chairman



Susan Sullivan-Bisceglia, Member



J. Christopher Meagher, Member



Mark G. Pearce, Member



Jean Grumet, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
June 25, 2008