

Anne P. Stevason
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Mark S. Perla
Gregory A. Monteleone
Susan Sullivan-Bisceglia
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State of New York
Industrial Board of Appeals



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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

LIA KES LLC, :

Petitioner, :

To review under Section 101 of the Labor Law: :

An Order to Comply under Article 12-A :

of the Labor Law, dated May 26, 2006 :

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :

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DOCKET NO. PR-06-035

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 June 5, 2006; and
2. An Answer was served and filed by the Respondent on September 19, 2006; and
3. A hearing was to be held at the Department of Labor's offices in New York City on March 7, 2007; and
4. Both parties were present during the course of the hearing and were 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 has considered the pleadings, the testimony, the hearing exhibits, the documents and all of the papers filed here; and
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 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 Order to Comply with Article 12-A, dated May 26, 2006, under review herein, is affirmed in all respects.
2. That the Petition for Review filed herein, be and the same hereby is, denied.



Anne P. Stevason, Chairman

ABSENT

Mark S. Perla, Member *



Gregory A. Momeleone, 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

The Board having given due consideration to the pleading, the testimony, the hearing exhibits, the documents and all of the papers filed herein, makes the following findings of fact and law pursuant to the provisions of the Board's Rules of Procedure and Practice (Rules) § 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 a manufacturer as defined in Labor Law § 340(d).

Yong Soon-Hwang a labor standards investigator testified concerning DOL's investigation. Petitioner is a business in the apparel industry and, as such, is required to register with DOL each year. On February 28, 2006, Hwang was on a random patrol, checking apparel industry businesses for compliance, in the mid-town Manhattan area. He testified that he went to the Petitioner's place of business at 325 W. 38th Street and asked Ms. Kes to produce the necessary registration documents for the year 2006. He testified that the Petitioner refused to show him her registration and proceeded to make a phone call to her husband. The investigator said he spoke to the husband by phone and explained why he was at the business.

Investigator Hwang said that the Petitioner was uncooperative and refused to answer his questions. He said that at that point he served the Notice of Labor Law Violation on the Petitioner.

The Respondent also called Andy Chan, who identified himself as a Senior Labor Investigator assigned to the Apparel Industry Task Force. He testified that he had mailed a Notice of Conference (admitted into evidence) to the Petitioner after the Order was issued, to allow her an opportunity to respond to the Order. She did not appear at the compliance conference.

During the course of Investigator Chan's testimony, the Petitioner, Lia Kes, arrived at the hearing. Hearing Officer Heady explained to the Petitioner what had occurred so far, and had the DOL counsel make a new opening statement.

Ms. Berman was sworn in and gave testimony on her own behalf. She admitted that she had failed to register in a timely fashion in 2006, but said she felt the \$1200 penalty was too severe. She admitted that she was given a chance to pay only \$500 as a settlement but said she "decided not to pay that either".

After the Petitioner's testimony, Investigator Chan was recalled to testify. He said that there had been a prior violation by the Petitioner in which she had paid a \$300 stipulated settlement. Ms. Berman did not dispute the prior violation and did not cross-examine Investigator Chan.

STANDARD OF REVIEW

The Board reviews the validity and reasonableness of an Order of Compliance made by the Commissioner of Labor (Commissioner) upon the filing of a Petition for Review. The Petition must specify the order "proposed to be reviewed and in what respect 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 of Compliance 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.

MANUFACTURER’S FAILURE TO REGISTER

A manufacturer’s obligation to register is found in the Labor Law, at § 341, which provides, in pertinent part:

“No manufacturer or contractor shall engaged in the apparel industry unless he or she registers with the commissioner, in writing, on a form provided by the commissioner...”

Labor Law § 345.4 further provides that, if there is a failure to register, the “commissioner may impose a civil penalty upon a manufacturer” of up to \$1,500 for an initial violation and up to \$3,000 for a second or subsequent violation.

Because there had been a prior violation, the Commissioner of Labor could have assessed a civil penalty of up to \$3000.00. Here, the \$1200 civil penalty, less than half of what could have been imposed, is reasonable.

In view of the testimony of the investigators, and the admission by the Petitioner that she had, indeed, failed to register as required, the Board finds that the Order should be upheld in its entirety.

The foregoing constitutes our findings of fact and law pursuant to § 65.39 of the Board’s Rules of Procedure and Practice (12 NYCRR 65.39).

Let a Resolution of Decision issue accordingly.



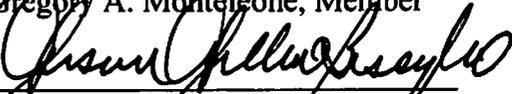
Anne P. Stevason, Chairman

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



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