

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :  
 :  
 LA SIMPATIA SUPERMARKET CORP., :  
 :  
 Petitioner, :  
 :  
 To Review Under Section 101 of the Labor Law: :  
 An Order to Comply with Article 19 and an Order :  
 under Article 19 of the Labor Law, both dated July 14, :  
 2006, :  
 :  
 - against - :  
 :  
 THE COMMISSIONER OF LABOR, :  
 :  
 Respondent. :  
 -----X

DOCKET NO. PR 06-067

RESOLUTION OF DECISION

APPEARANCES

David Segal, Esq., for Petitioner.

Maria L. Colavito, Counsel to the Department of Labor, Jeffrey G. Shapiro of Counsel, for Respondent, Commissioner of Labor.

WHEREAS:

Pursuant to Labor Law § 101 and Part 66 of the Industrial Board of Appeals' Rules of Procedure and Practice (Rules) (12 NYCRR Part 66), the above proceeding was commenced on September 1, 2006 when the Petitioner's president filed a verified petition to review two orders that the Commissioner of Labor (Commissioner) issued against the Petitioner on July 14, 2006. The order to comply with Labor Law article 19 (wage order) finds that Petitioner paid four employees at a wage rate below the minimum prescribed by law and directs payment of wages in the amount of \$40,878.13, interest of \$16,169.76 calculated at 16% which continues to accrue from the date of the order, and a civil penalty of \$20,440.00, for a total of \$77,487.89 due and owing on the date of the order. The second order under Labor Law article 19 (penalty order) assesses a penalty of \$4,000 against Petitioner for violations of Labor Law sections 195.3 and 195.4 during the periods December 20, 2004 through December 26, 2004 and December 27, 2004 through January 2, 2005.

The verified petition asserts three grounds for review: (1) that the petitioner was not afforded an opportunity to be heard and to call witnesses; (2) information in three affidavits attached to the petition; and (3) that the amounts alleged to be owed are inaccurate. Annexed to the petition are three affidavits purportedly of Petitioner's employees. Two of the affidavits are purportedly of employees named on the schedule annexed to the wage order who were found to have received wage underpayments. In words or substance, the affidavits state that the employees were paid in full and in compliance with minimum wage requirements; did not file or authorize the filing of wage claims against the Petitioner; and would like to nullify all such wage claims filed against Petitioner.

On October 10, 2006, the Commissioner moved to strike the petition's allegation that the petitioner was not afforded an opportunity to be heard and to call witnesses. On October 23, 2006, the Commissioner filed an answer to the petition. The answer denies the petition's assertions, including those in the affidavits annexed as exhibits to the petition, and objects to consideration of exhibits to the petition unless they are admitted into evidence. The answer also interposes as an affirmative defense that the affidavits themselves evidence Petitioner's underpayment of wages.

On April 21, 2008, a Notice of Hearing was sent to the attorneys for the Petitioner and the Commissioner, scheduling a hearing on the appeal for July 10, 2008 at 10:00 a.m. in New York City.

At hearing, in introductory remarks providing an overview of the proceedings, the hearing officer stated that the Petitioner had the burden to prove the orders under review invalid or unreasonable and to present its proof first. Next, the hearing officer admitted into evidence as hearing officer exhibits the two orders on review; the verified petition, including the three affidavits annexed as exhibits to the petition; the answer; and the Commissioner's motion to strike.

The hearing officer denied the Commissioner's motion to strike and, on the Commissioner's record objection to the admission of the employee affidavits into evidence, ruled that they were received in evidence for the limited purpose of showing the petition as it was filed with the Board, but not received as evidence in support of the merits of any claims.

Following this ruling, the Petitioner's attorney stated "I don't have my client here, nor do I have witnesses in his behalf. I have been trying to locate him and I have been unable to do that." He stated that he could not proceed without his client and requested an adjournment.

Noting that two months had elapsed since the Board had sent the Notice of Hearing to the parties and that Petitioner had not sought an adjournment until the hearing commenced, the Commissioner's attorney opposed an adjournment. He said that the Commissioner would twice incur the expenses of her attorney traveling from Albany to appear at hearing and of taking an investigator away from her other duties if an adjournment were granted.

The hearing officer offered to continue the hearing later in the day to give Petitioner's attorney some time to locate his client, but Petitioner's attorney said that he

needed about two weeks and would not attempt to try to find them that day. The hearing officer denied the application to adjourn the hearing.

In response to the hearing officer's question as to whether there was any evidence to offer in support of Petitioner's case, Petitioner's attorney said that there was none except the papers that had been submitted. The hearing officer next asked the Commissioner's attorney if he wanted to proceed with the Commissioner's case. Asserting that Petitioner "has submitted no evidence or any other reason to believe that the order is invalid," the Commissioner's attorney declined to put on her case.

In a proceeding to review an order that the Commissioner has issued pursuant to articles 6 and/or 19 of the Labor Law, a petitioner's burden is to prove that the order is unreasonable and/or invalid (Labor Law § 101; Rules 65.30).

The Board's quasi-judicial hearing procedures require that parties have the opportunity to probe the reliability and truthfulness of proof through various means including cross-examination. Although Petitioner's attorney averred that he was relying on papers submitted, where Petitioner has produced no witnesses at hearing, the Board will not credit allegations in the Petitioner's verified petition. Therefore, we affirm all of the hearing officer's rulings at hearing and find that the Petitioner has failed to meet its burden to establish that the orders are unreasonable and/or invalid.

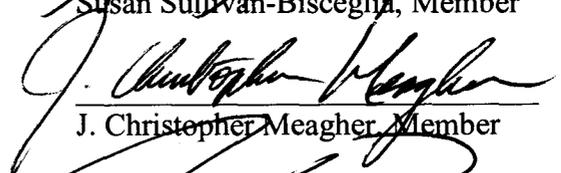
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

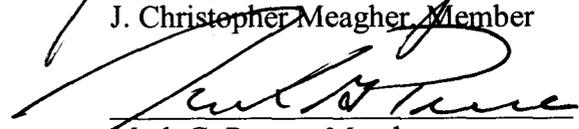
The Order to Comply with Article 19 of the Labor Law and the Order under Article 19 of the Labor Law, both issued against La Simpatia Supermarket Corp. on July 14, 2006, be, and the same hereby are, affirmed; and

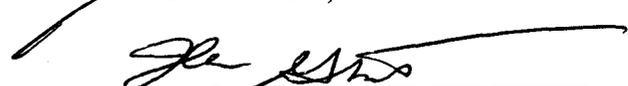
The petition be, and the same hereby is, dismissed in its entirety.

  
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 March 25, 2009.