

New York State
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:

FRANK R. KLINE, NICHOLAS C. MEMMO,
KLAUS KOCH, STEPHEN D. WEINROTH, and
JOESPH E. FERGUSON,

Petitioners,

To Review Under Section 101 of the Labor Law:
Two Orders to Comply with Article 6 of the Labor
Law, both dated August 11, 2006,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 06-068

RESOLUTION OF DECISION

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on September 7, 2006. Upon notice to the parties a hearing was held on February 12, 2008, in New York, New York before Board Chairperson Anne P. Stevason. The parties stipulated to various facts at the hearing, and both parties were afforded the opportunity to present evidence, make legal arguments, and submit post-hearing briefs.

Petitioners Frank Kline, Nicholas Memmo, Klaus Koch, Steven D. Weinroth and Joseph Ferguson were represented by Proskauer Rose LLP, Aaron J. Schindel, Esq. of counsel, and Respondent Commissioner of Labor (Commissioner) was represented by Maria Colavito, Counsel to the New York State Department of Labor (DOL), Jeffrey G. Shapiro of counsel.

The Commissioner issued the first Order to Comply that is under review in this proceeding on August 11, 2006. The Order directs compliance with Article 6 of the Labor Law, payment to the Commissioner for wages due and owing to various named employees in the amount of \$479,275.47 in unpaid wages from March 26, 2006 to April 10, 2006, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of \$21,639.62, and assesses a civil penalty in the amount of \$958,550.94, for a total amount due of \$1,459,466.03. The second Order, also issued August 11, 2006, directs compliance with Article 6 of the Labor Law, payment to the Commissioner for vacation benefits due and owing to 36 named employees in the amount of \$272,655.26 for the time period from April 11, 2005 to April 10, 2006, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of \$12,310.57, and assesses a civil penalty in the amount of \$545,310.52, for a total amount due of \$830,276.35.

EVIDENCE

The parties stipulated to the following relevant facts:

- Universal Diagnostics Laboratories, Inc. (UDL) was the employer of the employees owed wages under the Orders.
- UDL was owned by Lexington Management Group, Inc (LMG).
- In December 2004, Lexington Management Group was acquired by National Laboratories Partners, LLC (NLP).
- As of November 2005, Petitioners Steven Weinroth and Frank Klein were members of the Board of Directors of UDL, LMG, and NLP. Weinroth resigned from the Board of Directors of UDL, LMG and NLP effective February 22, 2006.
- None of the individual Petitioners was ever an officer of UDL.
- None of the individual Petitioners ever exercised the authority to hire or fire employees of UDL.
- None of the individual Petitioners had the power to supervise or control any of the employees of UDL.
- None of the individual Petitioners had the authority to determine the rate of pay or otherwise supervise UDL's employees or their conditions of employment.
- None of the individual Petitioners had any involvement in determining the method of payment of UDL's employees or otherwise directing their work.
- None of the individual Petitioners had any authority to sign paychecks, nor did they ever sign paychecks for UDL's employees.

- None of the individual Petitioners ever maintained employment records of UDL with respect to employees of UDL.

DISCUSSION

The standard of review in this proceeding is whether the Commissioner's orders are valid and reasonable (Labor Law § 101), and pursuant to Board Rules of Procedure and Practice 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 Petitioners to prove that the Orders are invalid or unreasonable. For the following reasons, we find that the Petitioners have met this burden.

(A) The Petitioners are not "employers" under Article 6 of the Labor Law

Individuals can only be held liable for unpaid wages under Article 6 of the Labor Law if they are employers of the employees in question. "Employer" is defined by Article 6 as "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines "employ" to include "suffer or permit to work" (29 U.S.C. § 230 [g]), and it is well settled that "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act" (*Chung v. The New Silver Palace Rest., Inc.*, 272 F.Supp.2d 314, 319 n6 [SDNY 2003]).

In *Herman v. RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir. 1999), the Second Circuit Court of Appeals stated the test used for determining employer status by explaining that:

"Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).

Considering these four factors, the Board finds that none of the individual Petitioners was an employer of the employees listed in the Orders. The parties stipulated that none of the Petitioners had the power at UDL to hire and fire workers, supervise and control work schedules

or conditions of employment, determine the rate and method of payment, or maintain employment records. Therefore, none of the individual Petitioners is liable pursuant to Article 6 of the Labor Law for the unpaid wages and supplements of UDL's employees.

(B) Shareholder liability under the Business Corporation Law is not a basis for individual liability under Article 6 of the Labor Law

The Commissioner argues that corporate shareholders are included within the broad definition of "employer" under Article 6 of the Labor Law when the provisions of Business Corporation Law (BCL) § 630¹ -- a separate statute providing for shareholder liability for unpaid wages -- have been met, and that therefore the Commissioner's Orders against the individual Petitioners were reasonable. We disagree.

As discussed above, individuals are liable for unpaid wages under Article 6 of the Labor Law only if they are "employers," and the test is whether such individuals had the power to control the employees in question. The parties stipulated that the individual Petitioners exercised no control over the employees named in the Orders. Although we agree that the definition of employer under Article 6 of the Labor Law is a broad, it may not reasonably be extended to include mere corporate shareholders absent evidence that such corporate shareholders "possessed the power to control the workers in question" (*Herman*, 172 F3d at 139). No such evidence is before the Board.

While it is true, that individual corporate shareholders may be held personally liable for unpaid wages and supplements under BCL § 630, the Board is not the proper forum for determining shareholder liability under the BCL. In order to hold a corporate shareholder liable under BCL § 630, the Commissioner must follow all of the procedural requirements of that statute, including service of timely and proper notices, and commence an "action" after the return of an unsatisfied judgment against the corporation (*see* BCL § 630 [a]). Proceedings before the Board are not "actions" (*Matter of the Petition of 238 Food Corp. v. Commissioner of Labor*, IBA Docket No. PR 05-068), and therefore we do not have jurisdiction to determine shareholder liability under the BCL or to enforce an unsatisfied judgment against a corporation. Accordingly, we decline to reach the issue of whether the individual Petitioners were among the ten largest shareholders of UDL, and find the Commissioner's incorporation of BCL § 630 into the definition of "employer" under Article 6 of the Labor Law unreasonable.

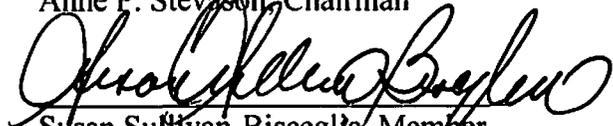
¹ BCL § 630 (a) provides in relevant part that: "The ten largest shareholders . . . of every corporation . . . shall jointly and severally be personally liable for all . . . wages or salaries due and owing to any of its laborers, servants or employees . . . for services performed by them for such corporation. Before such laborer, servant or employee shall charge such shareholder for such services, he shall give notice in writing to such shareholder that he intends to hold him liable under this section. Such notice shall be given within one hundred and eighty days after termination of such services An action to enforce such liability shall be commenced within ninety days after the return of an execution unsatisfied against the corporation upon a judgment recovered against it for such services."

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

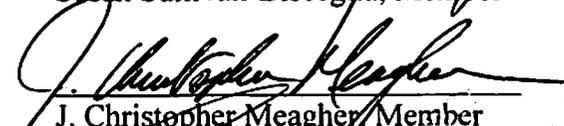
1. The Orders to Comply issued August 11, 2006, are modified consistent with this Resolution of Decision by removing the names of Frank Kline, Nicholas Memmo, Klaus Koch, Steven D. Weinroth and Joseph Ferguson from such Orders.
2. The Petition for Review be, and the same hereby is, granted.



Anne P. Stevenson, Chairman



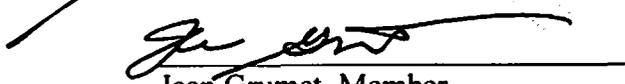
Susan Sullivan-Bisceglia, Member



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
December 17, 2008.