

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:	:
	:
BELLPORT INC.	:
(T/A US PETROLEUM)	:
	:
Petitioner,	:
	:
To review under Section 101 of the New York State	:
Labor Law: An Amended Order to Comply with	:
Article 19 of the Labor Law, dated October 20, 2006	:
	:
-against-	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
-----X	

DOCKET NO. PR-06-082

RESOLUTION OF DECISION

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on November 9, 2006. Upon notice to the parties a hearing was scheduled and held on May 22, 2007 in the Board's Albany office before Khai H. Gibbs, then Associate Counsel to the Board and designated Hearing Officer in this proceeding.

Petitioner Bellport, Inc. was represented by its accountant, Frederick Seifried, and Respondent, Commissioner of Labor (Commissioner), was represented by Maria Colavito, Counsel to the Department of Labor (DOL), Benjamin T. Garry, of counsel. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses and to make statements relevant to the issues.

The Order to Comply under review in this proceeding was issued by the Commissioner on October 20, 2006 and directs compliance with Article 19 of the Labor Law. The Order directs payment to the Commissioner for wages due and owing to one named Claimant in the

for unpaid overtime from June 20, 2003 to March 12, 2004, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of \$3,601.11, and assesses a civil penalty in the amount of \$2,160.00, for a total amount due of \$14,390.36.

### SUMMARY OF EVIDENCE

Bellport, Inc. t/a U.S. Petroleum is a gas station and convenience store located in Suffolk County, New York.

DOL Labor Standards Investigator Frederick Siefried and DOL Senior Labor Standards Investigator Frank King testified concerning the investigation that led to the Order to Comply under review in this proceeding.

Siefried testified that on September 7, 2004, DOL's Division of Labor Standards received a complaint for unpaid overtime wages against the Petitioner from a Complainant whose name is known to the parties. The Complainant alleged that the Petitioner did not pay him for 2,700 hours of overtime worked from June 25, 2003 to March 12, 2004, during which time he worked for \$7.00 an hour from 6:00 a.m. to 10:00 p.m. seven days a week with no lunch break. Attached to the Complaint were notarized statements from six other employees of the Petitioner, which according to Siefried, corroborated the overtime hours that the Complainant claimed to have worked.

Siefried conducted a field visit at the Petitioner's premises on April 12, 2005 to review payroll records and interview any employees on duty at the time, however, the employees who were at work then were uncooperative. Siefried testified that no payroll records were available for inspection on the day of the field visit although he was able to obtain that day's "shift sheet" listing the names and hours of work of the employees present at the time of the field visit. At the conclusion of the field visit, Siefried issued a written Request for Payroll Records and Notice of Revisit.

Siefried revisited the Petitioner's premises on April 19, 2005. Since no payroll records were available for inspection during the revisit, DOL issued a Notice of Labor Law Violation for failure to keep and maintain required records.

On October 31, 2005, Siefried met with the Complainant and received his records of the daily and weekly hours that he had worked. The Complainant told Siefried that the records had been kept contemporaneously. The Commissioner issued the Order based solely on the Complainant's records because the Petitioner failed to produce any documents in response to DOL's Request for Payroll Records.

Senior Labor Standards Investigator Frank King testified that on May 15, 2005, Brett Fliegel, the Petitioner's Accountant, provided DOL with "weekly payroll records" for the Complainant for part of the time period covered by the investigation. The weekly payroll records purport to list the weeks, hours per week, and wages paid by the Petitioner to Complainant; however, King explained that DOL did not consider these records valid because they did not cover the entire period under investigation and did not contain the daily hours worked as the Labor Law requires.

Ercan Mimarbasi, an officer and shareholder of Bellport, Inc., testified for the Petitioner that the Petitioner did not employ the Complainant prior to August 30, 2004, and speculated that perhaps the Complainant had worked at another gas station from June 25, 2003 to August 30, 2004. Mimarbasi conceded, however, that he had no personal knowledge of the Complainant's hours of work and that he had never seen any "shift reports" for the Complainant.

Fliegel also testified, explaining that he was not in possession of the Petitioner's shift sheets and had never seen them. The weekly payroll records he prepared for the Complainant, and that were produced to DOL, were based on summary sheets that the Petitioner sent to him. Fliegel had no explanation for the Petitioner's failure to produce the shift sheets to DOL.

The Complainant did not testify at the hearing, nor did the owner of Bellport, Inc. or any other witness with personal knowledge of the hours that the Complainant worked.

## GOVERNING LAW

### Standard of Review

In general, when a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. 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).

The Board shall presume that an order of the Commissioner 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 the Board's Rules of Procedure and Practice § 65.30 [12 NYCRR 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.

### The Commissioner's Authority to Issue an Order to Comply and Assess Civil Penalties

If the Commissioner determines that an employer has violated Article 19 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 nineteen (minimum wage act) . . . 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.”

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

“1. 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.

....

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.”

#### Record Keeping Requirements

Labor Law § 661 provides in relevant part that:

“Every employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate . . . . Every employer shall keep such records open to inspection by the commissioner or his duly authorized representative at any reasonable time . . . .”

Labor Law § 195(4) requires all employers to “establish, maintain and preserve for not less than three years payroll records showing the hours worked, gross wages, deductions and net wages for each employee.” Additionally, every employer is required to “establish, maintain and preserve for not less than six years, weekly payroll records which shall show for each employee . . . the number of hours worked daily and weekly . . .” (12 NYCRR § 142-2.6 [a] [4]).

#### Premium Pay for Overtime

12 NYCRR § 142-2.2 requires an employer to pay nonresidential employees at a wage rate of 1 ½ times the employee’s regular rate for all hours worked over 40 in a work week.

## FINDINGS AND CONCLUSIONS OF LAW

The Board having given due consideration to the pleadings, hearing testimony and 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).

DOL investigated the Complainant's complaint alleging that he was not paid the mandated time and one-half overtime premium for 2,700 overtime hours that he worked from June 25, 2003 to March 12, 2004. DOL visited the Petitioner's business on April 12, 2005, but found Petitioner's employees uncooperative and no payroll or time records there to inspect other than that day's "shift sheets" consisting of the names of the employees working that day and the time that they arrived to work. DOL returned to the Petitioner's business on April 19, 2005, but again there were no records available for inspection.

On May 15, 2006, the Petitioner sent DOL "weekly payroll records" consisting of a list of weeks, hours and wages that were purportedly worked by the Complainant. These records failed to include the daily hours worked as required by 12 NYCRR § 142-2.6(a) (4) and DOL refused to consider them. DOL then issued the Order under review in this proceeding based on the Complainant's allegations of the number of overtime hours that he worked.

Labor Law § 196-a provides in relevant part 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 shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements." The Petitioner failed to maintain the payroll records required by 12 NYCRR § 142-2.6. Therefore, pursuant to Labor Law § 196-a, the Petitioner had the burden of proving that the Complainant was paid the disputed wages. The Petitioner has failed to meet this burden.

The Order here is based solely on the complaint filed by the Complainant which, on its face, alleges what appears to be an incredible amount of overtime hours worked during a relatively short time period. However, even in the absence of testimony from the Complainant or any witness with first hand knowledge of the hours that he worked, the burden remains with the Petitioner to demonstrate that the Order is either invalid or unreasonable. While we are troubled by the quality of the evidence that DOL presented at hearing, the Petitioner failed to meet its burden where its only witnesses were a manager who had no first hand knowledge of the hours worked by the Complainant, and the Petitioner's accountant who likewise had no personal knowledge of the Complainant's hours of work. In the absence of any credible documentary or other evidence to contradict the amount of unpaid overtime set forth in the Commissioner's Order, we find that the Petition must be dismissed (*see* Labor Law § 196-a and 12 NYCRR § 65.30; *see also* *Angello v. National Finance Corp.*, 1 AD3d 850, 853-854 [2003] [burden of disproving the amounts sought in an employee's claim falls to the employer]).

## CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Order additionally assessed a civil penalty, in the amount \$2,160.00. 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.

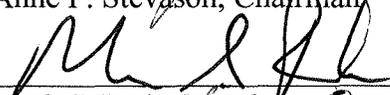
### INTEREST

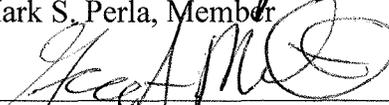
Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include “interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date 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.”

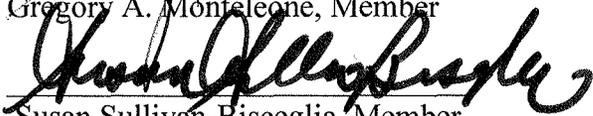
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

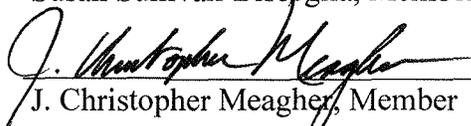
1. The Order to Comply with Article 19 of the Labor Law, dated October 20, 2006, under review herein, is affirmed; and
2. The Petition for Review be and the same hereby is, denied.

  
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Anne P. Stevason, Chairman

  
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Mark S. Perla, Member

  
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Gregory A. Monteleone, Member

  
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Susan Sullivan-Bisceglia, Member

  
\_\_\_\_\_  
J. Christopher Meagher, Member

Dated and signed in the Office  
of the Industrial Board of Appeals  
at New York, New York, on  
January 23, 2008.

Filed in the Office of the  
Industrial Board of Appeals  
at Albany, New York on  
January 28, 2008.

DAR