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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Application of: MY SERVICE CENTER, INC., Petitioner, To Review Under Section 101 of the Labor Law: Two Orders to Comply Under Article 19 of the Labor Law and an Order to Comply Under Article 6 of the Labor Law, all dated October 20, 2006, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 06-086 RESOLUTION OF DECISION

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on November 10, 2006. Upon notice to the parties a hearing was held on September 24, 2007 in the Board's White Plains office before Board Member Susan Sullivan-Bisceglia.

Petitioner My Service Center, Inc., was represented by Adam Peska, Esq. of Peska & Associates, PC, and Respondent Commissioner of Labor (Commissioner) was represented by Maria Colavito, Counsel to the New York State 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 Commissioner issued the three Orders to Comply that are under review in this proceeding on October 20, 2006. The first Order (Wage Order) directs compliance with Article

19 of the Labor Law, payment to the Commissioner for wages due and owing to a named employee (Complainant) in the amount of $2,662.00 for unpaid overtime from October 27, 2002 to February 24, 2004, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of $1,123.72, and assesses a civil penalty in the amount of $1,333.00, for a total amount due of $5,115.72. The second Order (Deductions Order) directs compliance with Article 6 of the Labor Law for wage deductions from the Complainant, in the amount of $2,150.00, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of $912.30, and assesses a civil penalty in the amount of $1,075.00, for a total amount due of $4,137.30. The third Order (Penalty Order) directs compliance with Article 19 of the Labor Law and payment to the Commissioner of civil penalties for failure to furnish true and accurate payroll records in the amount of $500.00.

I. SUMMARY OF EVIDENCE

Petitioner My Service Center, Inc. is an automobile service station located in New Rochelle, New York. Mr. Daniel Cianciulli is the President of My Service Center, Inc. One named Complainant filed a claim against the Petitioner with DOL for unpaid wages, overtime, and illegal wage deductions for the time period from October 27, 2002 to February 24, 2004. DOL initiated an investigation of the Petitioner after receiving the Complainant's claim and at the conclusion of its investigation the Commissioner issued the Orders under review.

The Complainant testified that he was employed by the Petitioner from October 27, 2002 to February 24, 2004. During that time period, he worked a schedule of 7:30 a.m. to 4:30 p.m. Monday to Friday, and 7:30 a.m. to 1:00 p.m. on Saturdays. The Complainant further testified that he usually worked more than that because the Petitioner would not allow him to leave until he finished all of the work he had started each day. The Complainant's salary during the entire time that he worked for the Petitioner was $450.00 per week paid by cash no matter how many hours the Complainant actually worked.

The Complainant testified that he punched in each day on a time clock and that he did not have any records of the hours he worked because the Petitioner kept the time cards.

The Complainant testified that money was deducted from his wages to pay for damage to cars that he caused while working for the Petitioner.[1] The Complainant explained that he had hit four cars and had "no control over [his] money." Mr. Cianciulli told him that he had to pay for the damage. The payments were not taken all at once, but were deducted over time. The Complainant also testified that deductions were taken from his wages for paperwork mistakes as "fines."

Mr. Cianciulli testified on behalf of the Petitioner. Mr. Cianciulli stated that he paid the Complainant on a salary basis because the Petitioner was a "manager." The Complainant, according to Mr. Cianciulli's testimony, "watched the work" of the two other mechanics when Mr. Cianciulli was not on the premises. Mr. Cianciulli testified that the Complainant had

[1] The Petitioner also deducted child support from the Complainant's wages but such deduction is not at issue in this matter because deductions made pursuant to a court order are lawful under Labor Law § 193.

authority to hire and fire employees but that he never exercised such authority. The Complainant had no authority to set work schedules. The Complainant denied that he was a manager.

Mr. Cianciulli further testified that he did not remember making deductions from the Complainant's pay for damaged vehicles. He stated that he had insurance so he would not have needed to make any deductions from the Complainant's wages. Mr. Cianciulli admitted that the Petitioner deducted the cost of tools from its employees' wages, but denied making deductions for mistaken work orders.

Finally, Mr. Cianciulli testified that he did not have any wage or hour records for the Complainant. He stated that the employees punch in on a time clock and that the time records are only kept for three years. Mr. Cianciulli explained that his son deals with the bookkeeping and provides the records to the accountant.

Senior Labor Standards Investigator Jeannette Freytas testified for DOL. Ms. Freytas testified that the Complainant provided DOL with records of the deductions taken from his wages for advancements, loans, cars damaged during work, rent and gas. These records were provided to the Complainant by another of the Petitioner's employees, and were incomplete.

Ms. Freytas further testified that the records produced to DOL by the Petitioner showed the Complainant earned $375.00 per week for 40 hours at a wage rate of $9.38 an hour. The Petitioner's payroll records also showed tax deductions from the Complainant's wages. Ms. Freytas testified that these records were insufficient because they did not show the number of hours worked each week by the Complainant.

Ms. Freytas testified that she calculated the amount of overtime due to the Complainant based on a 48 hour work week at $450.00 per week. She used $9.38 as the regular hourly rate because $9.38 multiplied by 48 is $450.00. She calculated that the Complainant was underpaid $37.50 per week.

Ms. Freytas also testified that the Complainant was "probably owed more money" because she only included the deductions from wages for damage to four cars, and not other deductions claimed by the Complainant. Ms. Freytas did not include these other alleged deductions because she did not have any evidence and "did not want to pull a figure out of a hat, so those were left out."

II. 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 is required to presume that an order of the Commissioner is valid (Labor Law § 103).

Pursuant to the Board Rules 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 Petitioners to prove that the Order is not valid or reasonable.

Requirement to Pay Overtime

The Minimum Wage Order for Miscellaneous Industries provides that an employer shall pay a non-residential employee for overtime at a wage rate of 1 ½ times the employee's regular rate for hours worked over 40 in a work week subject to any applicable exemptions (12 NYCRR 142-2.2).

Record Keeping Requirements

Labor Law § 661 states in relevant part:

> "Every employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary, and shall, on demand, furnish to the commissioner or [her] duly authorized representative a sworn statement of the same. Every employer shall keep such records open to inspection by the commissioner or [her] duly authorized representative at any reasonable time . . . ."

The Minimum Wage Order for Miscellaneous Industries specifies the information required to be maintained. 12 NYCRR 142-2.6 provides in relevant part:

> "(a) Every employer shall establish, maintain and preserve for not less than six years weekly payroll records which shall show for each employee:
> (1) name and address;
> (2) social security number;
> (3) wage rate;
> (4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
> (5) when a piece-rate method of payment is used, the number of units produced daily and weekly;
> (6) the amount of gross wages;
> (7) deductions from gross wages;
> (8) allowances, if any, claimed as part of the minimum wage;

(9) net wages paid; and
(12) student classification."

DOL's Calculation of Wages in the Absence of Adequate Employer Records

The law requires employers to maintain payroll records that include, among other things, its employees' daily and weekly hours worked, wage rates, and gross and net wages paid (12 NYCRR 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or her designated representative (Labor Law § 661; 12 NYCRR 142-2.6).

An employer's failure to keep adequate records does not bar employees from filing wage complaints. Where employee complaints demonstrate a violation of the Labor Law, DOL must credit the complaint's assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of proving that the disputed wages were paid. (Labor Law § 196-a.) As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 (3rd Dept 1989), "[w]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer."

In *Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687-88 (1949), *superseded on other grounds by statute*, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

> "[W]here the employer's records are inaccurate or inadequate . . . [t]he solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act."

Citing to *Anderson v Mt. Clemens*, the Appellate Division in *Mid-Hudson Pam Corp., supra*, agreed: "The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee . . . Were we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute. That result should not pertain here."

Deductions from Wages

Labor Law § 193 provides in relevant part that:

> "1. No employer shall make any deduction from the wages of an employee, except deductions which:
>
> a. Are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency; or
>
> b. Are expressly authorized in writing by the employee and are for the benefit of the employee; provided that such authorization is kept on file on the employer's premises. Such authorized deductions shall be limited to payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee."

III. FINDINGS

The Board having given due consideration to the pleadings, hearing testimony, arguments, documentary evidence and post-hearing briefs, makes the following findings of fact and law pursuant to the provisions of Board Rule 65.39 (12 NYCRR 65.39).

The Petitioner Violated Article 19 of the Labor Law By Failing to Pay Overtime

We find that the Complainant worked at least 48 hours per week for a weekly salary of $450.00, and that in the absence of credible payroll records[2], it was reasonable for DOL to calculate the overtime wages due to the Complainant based solely on the Complainant's recollection of the hours that he worked (*see* Labor Law § 196-a; *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d at 821).

Although the Petitioner alleges that the Complainant is not owed overtime because he was a manager excluded from the coverage of the minimum wage order, we are not persuaded. 12 NYCRR 132-2.14 (c) (i) exempts from coverage any person:

> "(a) whose primary duty consists of the management of the enterprise in which such individual is employed or of a customarily recognized department or subdivision thereof;
> (b) who customarily and regularly directs the work of two or more other employees therein;

[2] The "payroll summaries" in evidence are not credible. For example, the parties agree that child support was deducted from the Complainant's wages; however, the "payroll summaries" do not reflect any such deduction.

(c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status or other employees will be given particular weight;
(d) who customarily and regularly exercise discretionary powers; and
(e) who is paid for his services in a salary of not less than (1) $386.25 per week on and after March 31, 2000 [through December 31, 2004], inclusive of board, lodging, other allowances and facilities . . . ."

This exemption is to be narrowly construed against the employer, who "bears the ultimate burden of establishing that its employee falls within the exemption" (*Wetzel Services v. Industrial Board of Appeals*, 252 A.D.2d 212. 214 [3d Dept. 1998]). The Petitioner has provided no evidence other than a vague statement that the Complainant "watched the work" of two other mechanics during the few hours a week that Mr. Cianciulli was away from the garage. The Complainant denied that he was a manager or had any managerial authority, and we find that he was not an exempt executive employee because the Petitioner presented no evidence that management was the Complainant's primary duty (*Donovan v. Burger King Corp.*, 675 F2d 516, 520-21 [2d Cir. 1982]).

The Petitioner failed to meet its burden to establish that the Complainant was an executive employee, and accordingly we find that the Complainant was subject to the Minimum Wage Order

The Petitioner Violated Article 6 of the Labor Law By Making Illegal Deductions From the Complainant's Wages

Labor Law § 193 prohibits any employer from making any deduction from the wages of an employee except for deductions that are made in accordance with any law, rule or regulation; or are expressly authorized in writing by the employee and are for the employee's benefit. The statute further provides that "such authorized deductions shall be limited to payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee" (Labor Law § 193 [1] [b]).

We find that the Petitioner violated Labor Law § 193 by making deductions from the Complainant's wages to recoup for damage done by the Complainant to four cars while working for the Petitioner (*see e.g. Matter of Claim of La France*, 173 AD2d 989 [3d Dept. 1991]). The Complainant testified that the Petitioner deducted money from his wages to pay for damage to four vehicles, and this testimony was corroborated by the Petitioner's own records. Accordingly, the Deductions Order is reasonable.

The Imposition Civil Penalties Was Reasonable

If the Commissioner determines that an employer has violated Articles 6 or 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]).

Along with the issuance of an order directing compliance, the Commissioner is authorized to assess a civil penalty based on the amount owing. Labor Law § 218 (1) continues:

> "In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of these provisions, rules, or regulations, or to an employer whose violation has been found to be willful or egregious, shall direct payment to the Commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due. 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."

Ms. Freytas testified that a 50% penalty was imposed on the Petitioner because it was uncooperative with DOL's investigation, and did not keep required records. Ms. Freytas further testified that the civil penalty would have been higher if this had not been the Petitioner's first violation. We find that the considerations and calculations made by DOL in assessing the penalties in the Wage and Deductions Orders were reasonable.

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 underpayment t o the date of payment." Banking Law § 14-a sets the "maximum rate of interest" at "sixteen per centum per annum."

The Penalty Order

The Penalty Order levies a $500.00 civil penalty against the Petitioner pursuant to Labor Law § 661 and 12 NYCRR 142-2.6 for failing to keep and/or furnish true and accurate payroll records for each employer. We find that the Petitioner failed to maintain and furnish accurate payroll records for each employee as charged. Therefore, we find the Penalty Order valid and reasonable.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order issued October 20, 2006, is affirmed.
2. The Deductions Order issued October 20, 2006, is affirmed.
3. The Penalty Order issued October 20, 2006, is affirmed.
4. The Petition for Review be, and the same hereby is, dismissed.

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
November 19, 2008.