

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 Application of: :
 :
JOSEF MENDLOVIC :
(T/A UNITED HUDSON MANAGEMENT CO.) :
Petitioner, :
 :
DOCKET NO. PR 07-002
 :
To review under Section 101 of the New York State :
Labor Law. Two Orders under Article 6, dated :
November 17, 2006, :
 :
Respondent, :
-----X

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on January 12, 2007. The Answer was filed on April 20, 2007. Upon notice to the parties a hearing was held on October 29, 2007. Petitioner Josef Mendlovic T/A United Hudson Management Co. (Mendlovic or Petitioner), appeared *pro se*, 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.

On November 17, 2006 the Commissioner issued the two Orders to Comply (Orders) under review in this proceeding. The Orders are based on the non-payment of wages and expenses due to a named Complainant for work performed from February 2, 2005 through September 30, 2005. The first Order demands payment of \$2,507.04 in unpaid wages, \$453.89 in interest and a civil penalty of \$630.00, for a total due of \$3,591.03. The second Order consists

of a demand for payment of \$736.00 in unreimbursed expenses, \$131.43 in interest, and \$185.00 in civil penalty for a total due of \$1,042.43.

The main issue before the Board is whether Complainant was an employee of the Petitioner. The Petitioner maintains that Complainant worked as a building superintendent for the owner of the apartment complex and not for the Petitioner's management company.

SUMMARY OF EVIDENCE

On January 13, 2006, Complainant filed two claims with DOL - one for unpaid wages for work he performed from February 2, 2005 to September 30, 2005 and the other claim for unreimbursed expenses in the amount of \$726.00. Complainant named Petitioner Josef Mendlovic and United Hudson Management Co. (Petitioner) as his employer. At the hearing Complainant testified that he met with Petitioner and the new owner of the apartment complex on February 1, 2005 when he was offered the job of property manager/building superintendent. He accepted the job offer on February 2, 2005 when he met with Petitioner only and Petitioner offered him free rent at a smaller apartment, utilities, cell phone and \$75 per week. During his employment Complainant's job duties included maintaining the apartments, preparing apartments to be rented, plumbing, painting, carpentry, and copying, serving and filing eviction notices.

Complainant testified that Petitioner was the only person that he dealt with during his employment. Petitioner reimbursed him for some, but not all of his expenses, and Complainant produced check stubs under the name United Hudson Management indicating that petitioner reimbursed him for cell phone usage, supplies and court fees to process eviction papers. When Complainant requested his wages, Petitioner reassured him that he would be paid. Complainant presented prospective tenants with United Hudson Management Co. form applications. Complainant left his job and the apartment complex after Petitioner ceased acting as property manager on September 30, 2005. Complainant testified that he was never paid \$75 per week and is now due wages for the entire period of his employment. He also testified and presented documents indicating that he paid \$1,226 in expenses attendant to his job duties but was only reimbursed \$500 so that he is due \$726.

Petitioner testified that he was the broker that sold the apartment complex to its current owner and that the owner was the employer of Complainant. The apartment complex owner paid Petitioner for each apartment that he rented in addition to a percentage of the monthly rents as property manager. Petitioner admitted reimbursing Complainant for cell phone and other expenses but said that he was reimbursed by the owner. Petitioner also admitted being responsible for eviction proceedings. Petitioner testified that he told Complainant that he would pay Complainant and then get reimbursed by the owner since the owner was slow in paying his bills. Petitioner was granted additional time after the hearing to produce documents indicating that he was reimbursed by the apartment complex owner. Documents were produced that indicated that Petitioner was paid 7% of monthly rents as a "Management fee," and \$200 for each apartment rented, and was also reimbursed for court expenses. The documents do not indicate that Petitioner was reimbursed for any payments to Complainant.

DISCUSSION

Standard of Review and Burden of Proof

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 [1]). 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.

FINDINGS

The Board, having given due consideration to the pleadings, hearing testimony and documentary evidence makes the following findings of fact and law.

The Board credits the testimony of Complainant that Petitioner hired him on February 2, 2005 to perform work as a building superintendent/manager for \$75 per week plus rent, utilities and cell phone expense. Complainant was reimbursed, at least some of his expenses, by Petitioner. Complainant followed Petitioner's directions in serving and filing eviction papers and renting apartments, and Petitioner was paid for these services by the apartment owner. Complainant's work was integral to Petitioner's business of managing the apartment complex and benefited Petitioner.

Pursuant to Labor Law § 191 Petitioner is liable to Complainant for \$2,507.14 in unpaid wages which represents \$75 per week from February 2, 2005 to September 30, 2005. Pursuant to Labor Law § 198-c Petitioner is liable to Complainant for \$726 in unreimbursed expenses.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Orders assess civil penalties in the amount of 25% of the wages ordered to be paid. Petitioner did not contest the reasonableness or validity of the penalty and therefore we do not review the amount of civil penalty.

INTEREST

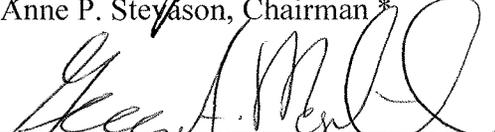
Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date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

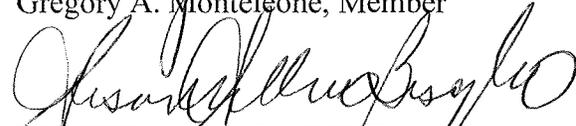
1. The Orders to Comply with Article 6 of the Labor Law, dated November 17, 2006, are hereby affirmed; and
2. The Petition is hereby denied.



Anne P. Stevason, Chairman *



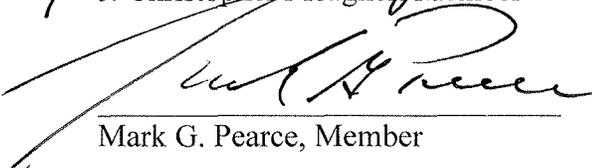
Gregory A. Monteleone, Member



Susan Sullivan-Bisceglia, Member



J. Christopher Meagher, Member



Mark G. Pearce, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
May 28, 2008

Filed in the Office of the
Industrial Board of Appeals
at Albany, New York on
May 30, 2008