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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
FLORAL PARK COMMUNITY CHURCH,	
Petitioner,	
	DOCKET NO. PR-07-014
To review under Section 101 of the New York State Labor Law: Two Orders under Article 6, dated February 9, 2007	RESOLUTION OF DECISION
-against-	
THE COMMISSIONER OF LABOR,	
Respondent.	

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on April 10, 2007. The Answer was filed on July 24, 2007. Upon notice to the parties a hearing was held on November 9, 2007. The parties submitted post-hearing briefs on or about February 19, 2008. Petitioner Floral Park Community Church (Church) was represented by Nixon Peabody LLP, John F. Bolton of counsel, 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 February 9, 2007 the Commissioner issued the two Orders to Comply (Orders) under review in this proceeding. The Orders are based on the non-payment of wages due to the Reverend Lois Stewart, Interim Pastor of the Church (Stewart) for the period of June 13, 2004 through June 10, 2005. The first Order demands payment of $20,800.00 in unpaid wages, $5,534.50 in interest and a civil penalty of $5,200, for a total due of $31,534.50. The second

Order consists of a demand for payment of $4,439.76 in unpaid wage supplements, $1,181.34 in interest, and $1,110.00 in civil penalty for a total due of $6,731.10.

The main issue before the Board is whether Stewart was an employee of the Church for the period of June 13, 2004 through June 10, 2005. The Church maintains that Stewart was terminated from her position as Interim Pastor as of June 13, 2004 and never rehired. It also maintains that Stewart's wages, if found due and owing, should be reduced by the amount of money that she received from Church members as honoraria, and that the civil penalty should be rescinded.

SUMMARY OF EVIDENCE

For the most part, the facts are not in dispute. Stewart was hired as Interim Pastor on June 17, 2001 pursuant to a verbal agreement. She was paid a weekly salary of $400 plus an additional $250 every four weeks to be paid into a pension fund and $120 every four weeks to defray the costs of health insurance. As Interim Pastor, Stewart led Sunday services, conducted Bible studies, prayer meetings, ministered to the sick and engaged in general outreach to the community, among other duties.

On May 17, 2004, the Church Board of Trustees met and agreed that, due to a decline in membership, and based on the votes of its members, the Church would close. The meeting set the closing date as June 13, 2004 and requested that Stewart remain Interim Pastor until that time. In executive session, while Stewart was excused from the meeting, the Church Board voted to pay Stewart a severance package of $2,400.

On or about June 1, 2004, the Chair of the Church Board of Directors, Ethel Nyquist (Nyquist), met with other members of the Church who together voiced their concern that the vote to close the Church was not in accordance with the Church's constitution and decided to keep the Church open. At the June 1st meeting it was understood that Stewart would continue on as Interim Pastor. From June 20, 2004 through June 10, 2005, Stewart openly continued to act as Interim Pastor – leading Sunday services, and continuing to perform all of her previous duties.

Stewart called the treasurer of the Church because she did not receive any paychecks from it after June 13, 2004. She was told that she would not be paid. She then spoke with the Superintendent of the parent church, the East Coast Conference of the Congregational Church, who referred her to their attorney. The Church is a member of the East Coast Conference and after closing, church property would revert to the Conference. Stewart explained that the Church was still open and that she was still working. The attorney acknowledged that the Church was open and that she was working and said that he would speak with the Superintendent about her salary. Stewart never heard back from them.

After June 13, 2004, the Church developed two factions: the trustees who were in favor of closing the church and the Chair and other members who kept the Church open and operating. The second faction went to court and on September 23, 2004 obtained a temporary restraining order, enjoining the trustees from: "(1) closing the church, thereby preventing the congregation from holding worship services, prayer meetings, bible studies and other related activities, (2) dissolving the corporation of the Floral Park Community Church, and (3) selling or transferring

assets including bank accounts, certificates of deposit and property of the Floral Park Community Church." The Church remained open until June 10, 2005 after trial when the temporary restraining order was dissolved.

On December 13, 2004 a special meeting of the Board of Trustees was called at which time there was a discussion of Stewart's status as Interim Pastor since Stewart had made repeated requests to be referred to as Pastor of the Church, not Interim Pastor. At the meeting it was also noted that the Church Board had voted to terminate Stewart and give her severance pay at the May 17, 2004 meeting but that due to the injunction to keep the church open and to hold weekly services, that had not happened. On January 9, 2005, the Church wrote Stewart stating that her termination had become effective June 13, 2004, asking her to return her keys, stating that the Church Board would take responsibility for worship services, and enclosing a check for $2,400 for severance pay. Stewart returned the check and continued to hold services.

No salary was paid to Stewart for her work from June 13, 2004 through June 10, 2005. However, Stewart was paid "honoraria"[1] of approximately $4,500 during the year. The honoraria came from the Church collections during services, which the treasurer of the Church refused to accept because of the vote to close the church.

In November of 2004 Stewart filed a complaint with DOL for her unpaid wages. In response, by letter dated May 9, 2005, Nyquist admitted that Stewart had not been paid and that the wages were owed to her.

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.

The Definition of Employee Under New York Law

Labor Law § 190 (2) defines "employee" for purposes of Article 6 to mean "any person employed for hire by an employer in any employment." "Employed" is defined at Labor Law

[1] Stewart testified that honoraria are different from salary but that she had received no honoraria prior to the time period in question, although she did receive a Christmas gift from the Church.

§ 2 (7)[2] as including "permitted or suffered to work."

In determining that an employer was liable for unauthorized overtime since it suffered or permitted the work, the court in *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 287 (2d Cir 2008), stated that "an employer's actual or imputed knowledge that an employee is working is a necessary condition to finding the employer suffers or permits that work." (Citations omitted.) Conversely, the court found that "[a]n employer who has knowledge that an employee is working, and who does not desire the work be done, has a duty to make every effort to prevent its performance." (*Id.* at 288.)

> "[A] presumption arises that an employer who is armed with knowledge has the power to prevent work it does not wish performed. Where that presumption holds, an employer who knows of an employee's work may be held to suffer or permit that work."

(*Id.* at 290.) In *Gotham Registry* the court found that the employer was liable for the unpaid wages, even though it lacked some control over the employees' work hours. "[T]he law does not require Gotham to follow any particular course to forestall unwanted work, but instead to adopt all possible measures to achieve the desired result. . . . Gotham has not persuaded us that it made every effort to prevent the nurses' unauthorized overtime." (*Id.* at 291.)

In *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 NY 25, 30 (1918), the New York State Court of Appeals found an employer liable for illegally employing a minor where there was a "sufferance" of the employment by the employer. In that case, Justice Cardozo observed that "[s]ufferance as here prohibited implies knowledge or the opportunity through reasonable diligence to acquire knowledge."

FINDINGS

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

Stewart was an employee of the Church from her date of hiring through June 10, 2005. Although Petitioner raised the issue of whether Stewart was an independent contractor in its Petition, it appears to have abandoned that argument in its Closing Brief by admitting that Stewart was hired and arguing that her employment was terminated on June 13, 2004. In any event, Stewart was paid a weekly salary, was its full-time Interim Pastor, had no opportunity for profit or loss and was an integral part of the Church. As such, she was an employee and not an independent contractor (*see e.g., Brock v. Superior Care, Inc.,* 840 F.2d 1054 [2d Cir 1988]).

The real issue is whether Stewart was an employee after June 13, 2004 since there was a decision at the Church Board meeting on May 17, 2004 that June 13, 2004 would be her last day. There is no dispute that Stewart performed all of her duties as Interim Pastor between June 13,

[2] The definitions in Labor Law § 2 are relevant throughout the New York State Labor Law. See Labor Law §§ 1 and 2.

2004 and June 10, 2005. She conducted regular Sunday services and ministered to the Church members. Her work was done openly and with the knowledge of the Church Board, the parent church and at the request of the Church Chair and some of its members. There was a court order requiring that the Church remain open for services. At the December Church Board meeting, there was a discussion as to whether Stewart should be named Pastor, instead of Interim Pastor, as she requested. Thus, she was still considered the Interim Pastor of the Church. Although the Church Board voted to give Stewart severance, payment was not sent to her until almost six months later. Other than a letter in January 2005, the Church Board made no attempt to prevent Stewart's employment. Stewart continued working as an employee at the behest of the Church Chair and her employment, at the very least, was suffered and permitted by the Church Board. Therefore, she is entitled to be paid for the period of June 13, 2004 through June 10, 2005.

The next issue is whether the honoraria that Stewart received during the relevant period should be credited against wages due. Although honoraria, as described by Stewart, are usually considered gifts and as such would not be credited against the amount that the Church owes, in this case, the honoraria came from collections during church services, which the Church Board refused to accept. In addition, Stewart testified that she received no honoraria prior to the period of time when she was not receiving a salary. Therefore, since the money paid to Stewart came from collections during church services and this was money that, under normal circumstances, would belong to the church, the honoraria received by Stewart should be credited to the Church against wages due. At the hearing, Stewart testified that she kept a record of the amount of the honoraria that she received. The Order should be modified to reflect the amounts received by Stewart during the relevant period.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Orders assess civil penalties in the amount of 25% of the wages ordered to be paid. Labor Law § 218 provides, in relevant part:

> "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 those provisions, rules or regulations, or to an employer whose violation is 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, benefits or wage supplements 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, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements."

Section 218 mandates a civil penalty of 200% where the Labor Law violation is for failure to pay wages, etc. and the employer had a previous violation or its violation was willful or

egregious. The Legislature amended section 218 to add this provision in 1997 in an effort to provide DOL "and working people with stronger and more varied tools with which to collect wages."[3] The amendment replaced a provision allowing for the imposition of a civil penalty not to exceed 50% of the wages. However, this provision left intact the factors that DOL must consider in determining the amount of penalty for first-time and non-egregious violations and for violations for other than failure to pay wages.

Petitioner argues that the facts of this case do not warrant the imposition of a penalty because there was no showing that the violation was willful or egregious and there is no statutory or regulatory authority for the imposition of a minimum 25% penalty. Petitioner further argues that the factors enunciated in Section 218 do not apply to violations for failure to pay wages but only to violations other than failure to pay wages and that even if the factors did apply, they would mitigate against a finding that penalties are due.

However, the factors to be considered in determining the appropriate penalty are not limited to violations other than failure to pay wages, as the Petitioner maintains. Although the section may not be artfully worded, the provision that "in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements" shall be considered in addition to the other factors, requires an interpretation that these factors are to be considered where there is a violation of failure to pay wages and the violation is a first and is not willful or egregious. Otherwise, this provision would have no meaning. In *Leader v. Maroney,* 97 NY2d 95, 104 (2001), the Court of Appeals held that "meaning and effect should be given to every word of a statute. 'Words are not to be rejected as superfluous where it is practicable to give each a distinct and separate meaning' (*Cohen v Lord, Day & Lord*, 75 NY2d 95, 100; see also, McKinney's Cons Laws of NY, Book 1, Statutes.)." To adopt Petitioner's interpretation of the section would render the above-mentioned phrase superfluous.

DOL Investigator King testified that the 25% minimum penalty was imposed on Petitioner after considering the size of Petitioner's business, its financial records and the fact that it had no prior violations and also that it was paying other bills during the relevant period. In light of this testimony and the fact that Stewart was not paid any salary by Petitioner for over one year, we find the penalty assessments to be reasonable and valid.

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."

[3] See McKinney's 1997 Session Laws of New York, p. 1685; L.1997, c. 605 § 1.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Orders to Comply with Article 6 of the Labor Law, dated February 9, 2007, are hereby modified and remanded to the Commissioner to determine the amount of honoraria received by Reverend Stewart during the relevant time period so that it may be deducted from the wages due and to recalculate the penalties in accordance with the revised unpaid wage amount; and

2. The Petition is hereby denied.

Anne P. Stevason, Chairman *

ABSENT
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
April 23, 2008

Filed in the Office of the
Industrial Board of Appeals
at Albany, New York on
April 25, 2008