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INDUSTRIAL BOARD OF APPEALS

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Members



Empire State Plaza
Agency Building 2, 20th Floor
Albany, New York 12223
Phone: (518) 474-4785 Fax: (518) 473-7533

Sandra M. Nathan
Deputy Counsel

Devin A. Rice
Associate Counsel

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Application of:	:	
	:	
BELLA KREMENTSOVA and POLISHMAID, INC.,	:	
	:	
Petitioner,	:	DOCKET NO. PR 07-097
	:	
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law, dated October 19, 2007,	:	<u>RESOLUTION OF DECISION</u>
	:	
- against -	:	
	:	
THE COMMISSIONER OF LABOR,	:	
	:	
Respondent.	:	

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WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on December 20, 2007. The Answer was filed on January 23, 2007.

Petitioners Bella Krementsova and Polishmaid, Inc. (together, Petitioner) ask the Board to review an Order to Comply with Article 6 of the Labor Law (Order) issued by the Respondent Commissioner of Labor (Commissioner) against Petitioner on October 19, 2007. The Order directs payment to the Commissioner of wages due employee Malgorzata Hamielec (Complainant) in the amount of \$1,973.50, with interest continuing thereon at the rate of 16% calculated to the date of the Order in the amount of \$143.60, and assesses a civil penalty in the amount of \$1,974.00, for a total amount due of \$4,091.10.

The Petition requests that the Order be reversed because, as the Petition alleges, the Complainant is at most owed \$500.00, which Petitioner admits it did not pay because Complainant breached her employment contract by quitting without notice. Petitioner concedes

that the withholding of these wages was improper, and now offers to pay them, but asserts that the remaining unpaid wages were fabricated by the Complainant.

The Answer denies the material allegations of the Petition and interposes as affirmative defenses that: (1) Labor Law § 193 does not permit an employer to withhold wages due to a breach of contract, and; (2) having failed to produce sufficient records showing the hours worked and wages paid the Complainant, the Petitioner has failed to meet its burden to prove that the Order is invalid or unreasonable.

Upon notice to the parties, the Board held a hearing before J. Christopher Meagher, Member of the Board and the designated Hearing Officer in this case. Petitioner was represented by its owner, Bella Krementsova. Respondent Commissioner was represented by Maria Colavito, Counsel to the Department of Labor (DOL), Benjamin T. Garry, of counsel. Each party was afforded full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements relevant to the issues, and submit written post-hearing arguments. Testifying in support of the Petition was Bella Kementsova. Testifying for the Commissioner were Malgorzata Hamielec, Beata Wronoska, and DOL Senior Labor Standards Investigator Giovanna

SUMMARY OF EVIDENCE

Petitioner Polishmaid, Inc, formerly known as Big Guy Services, Inc., is a cleaning company doing business in the State since 2004. Since the company changed its name to Polishmaid, Inc., in or about 2006, Petitioner Bella Krementsova has been its owner. Petitioner provides cleaning services to residences and offices in New York City. For all relevant purposes, Petitioner is an employer under the Labor Law.

Petitioner's day to day operations are managed by Ireneusz Kubak. Mr. Kubak schedules the hours of the cleaning employees, manages the payroll, and hires and fires the employees. Petitioner Krementsova assists Mr. Kubak with administrative and legal issues and signs the employees' paychecks.

Complainant credibly testified concerning the circumstances of her leaving Petitioner's employment and the unpaid wage complaint she filed against Petitioner with DOL. Her testimony was corroborated by coworker Beata Wronoska.

Complainant was employed by Petitioner from 2004 to May 6, 2007. She testified that up to 2007, Petitioner paid her fully for her work, but that the payments were always late. Starting in March, 2007, however, circumstances changed as Mr. Kubak underpaid her for several weeks and did not pay her at all after the beginning of April, 2007. After sharing her frustrations with Ms. Wronoska about not being paid, Complainant decided to quit and gave Mr. Kubak two weeks notice on May 6, 2007. Despite her offer to continue working for two more weeks, Mr. Kubak fired her immediately. Petitioner had issued Complainant a paycheck for \$500.00, but stopped payment on the check after terminating her employment on May 6.

On May 11, 2007, Complainant filed a claim for unpaid wages against Petitioner with DOL, alleging that she had been employed as a cleaner from March 4, 2007 to May 6, 2007, at

the rate of \$8.50 per hour, and that Petitioner had failed to pay her wages for such period in the amount of \$1,973.50. Complainant testified that she always kept time records of her work and that she based her claim on a timesheet that she had provided Mr. Kubak. That Complainant had given Kubak a copy of the timesheet was corroborated by Ms. Wronoska, who testified that she saw it when she was cleaning Mr. Kubak's apartment, and he was complaining about it to her.

DOL issued Petitioner a collection letter requesting that it either pay the claim or explain why the wages were not owed, and include payroll or any other records that substantiated its position. Petitioner responded with a copy of a letter to Complainant threatening a lawsuit because she had allegedly quit without notice.

By letter of June 8, 2007, DOL advised Petitioner that under no circumstances may an employer withhold wages from an employee¹. The letter informed Petitioner that it could pursue an action for damages against the Complainant in Civil Court, but that such action would not release Petitioner from the obligation to pay Complainant wages due under the Labor Law. DOL further requested that Petitioner respond to the claim by providing copies of the payroll records an employer is required to keep pursuant to Labor Law § 195, showing Complainant's daily hours worked and wages paid. In a phone call with Petitioner on July 3, 2007, DOL reiterated that Petitioner was not permitted to withhold wages from Complainant by virtue of a contract claim, and that Petitioner should remit payment or an Order to Comply would be issued.

As a result of Petitioner's failure to produce the requested records, or other proof that Complainant was paid the wages claimed, on October 19, 2007 the Commissioner issued Petitioner the Order to Comply under review herein. DOL investigator Giraldo testified that the 100% penalty the Commissioner ordered be paid was based on Petitioner's failure to produce its payroll records required to be maintained by law; the gravity of the monetary violation over \$1,000.00; and Petitioner's bad faith as evidenced by its failure to remit payment after DOL repeatedly advised that it was not authorized to withhold payment of any portion of the wages owed based on Complainant's alleged breach of contract.

At the hearing, Ms. Kremmentsova testified that Complainant would not have worked for such a long period of time without getting paid. According to Petitioner, this shows that Complainant exaggerated her hours and made up the remaining wages beyond the \$500.00 that Petitioner admitted she is owed. We reject this testimony as speculation, however, and credit the testimony of Complainant and her coworker concerning the circumstances of Complainant's leaving her employment and filing the wage claim with DOL.

Ms. Kremmentsova also testified that Petitioner informed DOL that its computer payroll records were destroyed by an assistant who left the company. She faults DOL for relying exclusively on Complainant's statements and not requesting Petitioner's bank records. Petitioner submitted such records into evidence for the period October, 2007 through March, 2008 and argues that they demonstrate that Petitioner was a small business with low monthly income from

¹ Labor Law §193 prohibits employers from making any deductions from wages owed to an employee, except deductions which are made in accordance with law or rule of a governmental agency, or which are expressly authorized in writing and for the benefit of the employee. It is improper to withhold money from an employee that may be owed the employer on a contract claim. *See, e.g., Maggione v. Bero Constr. Corp.*, 106 Misc 2d 384 (Sup. Ct. Seneca County 1980) (improper to withhold money owed on counterclaim).

customers, thereby making Complainant's claim for such a large number of hours and wages over a two-month period unlikely.

Petitioner's contention that it apprised DOL of relevant information concerning its pay records is not credible, however, since DOL investigator Giraldo testified that an employer's loss or destruction of pay records would have been recorded in DOL's investigative log. The log was introduced into evidence, and there was no such information recorded. Nor did Petitioner make an effort during DOL's investigation to submit any bank records to DOL, despite DOL's notice to Petitioner that it should forward any records that would substantiate its position that the monies claimed were not owed. We find the bank records Petitioner introduced into evidence irrelevant, in any event, since they do not cover the period for which the claim was filed.

Lastly, Ms. Kremntsova testified that after learning that withholding Complainant's last check was improper, Petitioner offered to remit such payment to DOL. Petitioner argues that such offer is evidence of its good faith and should mitigate the penalty. We do not credit this testimony, however, since the investigator testified that offers of settlement from employers are recorded in DOL's log and evaluated. There was no such offer recorded in the log.

GOVERNING LAW

Standard of Review and Burden of Proof in Proceedings Before the Board

The Labor Law provides that "any person . . . may petition the board for a review of the validity or reasonableness of any . . . order made by the commissioner under the provisions of this chapter," (Labor Law § 101 [1]), but also states that an order of the Commissioner "shall be" presumed valid (Labor Law § 103 [1]).

A petition filed with the Board that challenges the validity or reasonableness of the Commissioner's order must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101 [2]). It is a petitioner's burden at hearing to prove its allegations that the order on review is invalid or unreasonable: "The burden of proof of every allegation in a proceeding shall be upon the person asserting it" (Rules 65.30 [12 NYCRR 65.30]; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]).

It is therefore Petitioner's burden in this case to prove the allegations in its Petition that it does not owe the wages that the Commissioner ordered paid, aside from the \$500.00 it admits owing to Complainant.

An Employer's Obligation to Maintain Records and 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 §§ 137-2.1 and 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or her designated representative (Labor Law § 661 and 12 NYCRR § 137-2.1).

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); *Angello v. Natl. Fin. Corp.*, *supra*. 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."

FINDINGS

We affirm the Commissioner's Order directing Petitioner to pay \$1,973.50 in unpaid wages as valid and reasonable in all respects.

In the face of Petitioner's failure to produce accurate time and payroll records as required by Labor Law § 661 and 12 NYCRR §§ 137-2.1 and 142-2.6, we must credit DOL's calculation of wages unless the Petitioner has met its burden to prove that the Complainant was paid the

disputed amount. *Angello v. Natl. Fin. Corp., supra*. While the burden is not an impossible one, Petitioner's proof at the hearing was insufficient to meet its burden.

Petitioner's contention that it is a small business with insufficient monthly income from customers to generate the amount of wages asserted as owed is unsupported by any credible evidence in the record. Petitioner never submitted any bank records to DOL that would substantiate its position that Complainant is not owed the wages claimed, despite DOL's request for such records in Petitioner's possession. The bank records that Petitioner did submit at the hearing are irrelevant because they do not cover the period of the wage claim.

Petitioner's other contention, that Complainant must have exaggerated the wages owed because she would not have worked for several weeks without getting paid, is simply speculation and not evidence at all. What was required here was direct evidence from Petitioner's own payroll records, which the Labor Law requires it to maintain, showing the actual hours worked and wages paid the Complainant for the period of the claim. Petitioner's speculation cannot substitute for concrete proof. Moreover, Complainant and her coworker's credible testimony concerning the circumstances of Complainant's leaving her employment, the filing of her claim, and the records upon which the claim is based corroborate DOL's calculation.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

If the Commissioner determines that an employer has violated Article 6 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.”

DOL investigator Giraldo testified that a 100% penalty was imposed on Petitioner after DOL considered: (1) the gravity of the wage violation over \$1,000.00; (2) Petitioner's failure to provide any payroll records that the Labor Law requires be kept; and (3) Petitioner's bad faith in failing to remit payment to the Claimant after being repeatedly advised that it could not withhold wages based on a claim of breach of contract.

We reject Petitioner's contention that it made a \$500.00 offer of settlement during the course of the investigation which should be considered as mitigation. In light of the testimony submitted by DOL, we find the Order's penalty assessment reasonable and valid in all respects.

INTEREST

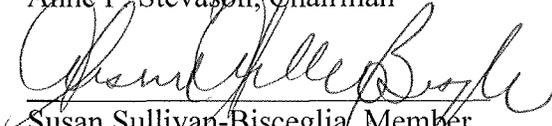
Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum." The Board finds that the considerations and computations required to be made by the Commissioner in connection with the interest set forth in the Order are valid and reasonable in all respects

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

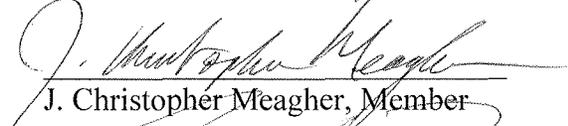
1. The Order to Comply with Article 6 of the Labor Law, dated October 19, 2007, is affirmed; and
2. The Petition be, and the same hereby is, dismissed in all other respects.



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
July 30, 2008.