STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: MICHELLE MOSHER D/B/A PERSONAL TOUCH CLEANING SERVICE, Petitioner, To Review Under Section 101 of the Labor Law: An Order under Article 19, and an Order to Comply with Article 6 of the Labor Law, both dated February 29, 2008, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 08-043 RESOLUTION OF DECISION

APPEARANCES

Michelle Mosher, *pro se* Petitioner

Maria L. Colavito, Counsel to the New York State Department of Labor, Mary E. McManus of Counsel, for Respondent.

WITNESSES

Michelle Mosher; Christine Anderson, Labor Standards Investigator.

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on March 21, 2008. The Answer was filed on June 11, 2008. Upon notice to the parties on December 1, 2008 a hearing was held before Susan Sullivan-Bisceglia, then Member of the Board, and designated hearing officer, on December 1, 2008 in Albany, New York. 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 two Orders against Petitioner on February 29, 2008. The first Order (Wage Order) is based on a finding of the non-payment of wages due to one named Complainant for the period June 18, 2007 through July 3, 2007 and demands payment of $525.00 in wages, $55.46 in interest and $263.00 in civil penalty, for a total of $843.46. The second Order (Penalty Order) assesses a civil penalty of $250.00 for failure to provide payroll records for the period of June 18, 2007 through July 3, 2007.

The Petition alleges that the Wage Order is unreasonable and/or invalid for the following reasons: (1) Complainant was only employed until June 26, 2007 and not July 3, 2007; and (2) Complainant did not work the hours that she claimed, and did a poor job which is why her employment was terminated earlier than anticipated. Although the Petition attaches a copy of the Penalty Order, there were no allegations in the Petition or at hearing that the Penalty Order was invalid or unreasonable. Therefore, we affirm the Penalty Order without further discussion.

SUMMARY OF EVIDENCE

Petitioner Michelle Mosher, doing business as Personal Touch Cleaning Service (Petitioner), operates a small commercial cleaning service in Plattsburgh, New York. Petitioner hired Complainant on March 5, 2007 to clean three local banks. The agreed rate of compensation was $225.00 per week.

Complainant filed a claim with the Department of Labor (DOL) against Petitioner on August 30, 2007, claiming that she worked from June 16, 2007 to July 3, 2007 and was not paid. Complainant claimed that she worked six days a week and was due $525.00: $225 for the week of June 16 – 23; $225 for the week of June 25 – 30, and $75 for July 2 and 3. Attached to her claim was a letter to Petitioner dated August 14, 2007, which Petitioner admitted receiving, indicating that she gave Petitioner two weeks notice July 1, 2007 since she was leaving the state due to her husband's job. Complainant also mentioned that she called Petitioner several times and met with her and still had not received her check. The letter also informed Petitioner of Complainant's new address in Texas.

On September 14, 2007 DOL sent Petitioner a collection letter notifying her of Complainant's claim for unpaid wages for the period of June 18, 2007 through July 3, 2007 in the amount of $525.00. On September 24, 2007, Petitioner sent a reply admitting that she owed some wages and agreeing that Complainant's rate of pay was $225 per week but complained that the banks were not cleaned as required and that Complainant failed to spend the required time cleaning them. Her reply also stated: "So yes I refused to pay Michele her full pay for her last 12 days that she worked. I did agree however to pay her for the time that she spent in the banks." Petitioner calculated that Complainant's rate of pay was $14.06 per hour and that she worked 1.5 hours per night for 12 nights and therefore was due $253.08 in wages. Petitioner then subtracted $40.00 because she had to "pay my new employee to catch up on the work. The actual amount Michele will get will be $213.08." Two more letters were sent to Petitioner which went unanswered and then the Wage Order under review was issued.

The Petition alleges that Complainant notified Petitioner on June 17, 2007 that she "could only work another week because she was moving to Texas with her husband." It

further states that Petitioner told Complainant on June 26, 2007 that another employee had been hired and would start work on June 28th. The real reason Complainant was let go early was due to a meeting Petitioner had at one of the banks where the bank threatened to terminate Petitioner's cleaning service due to the failure to properly clean the bank. The Petition states that Complainant is owed $272.00 based on working eight days at $34.00 per day and that Complainant has not been paid as yet.

Petitioner testified at the hearing that Complainant's last day of work was June 26, 2007. She stated that although her first letter to Complainant states that Complainant worked 12 days, this was incorrect and that after reviewing her records she realized that Complainant had actually only worked eight days during her last pay period. Petitioner introduced a letter dated October 1, 2008 from a cleaning service indicating that they were hired on June 27, 2007 and started working on June 28, 2007 to start cleaning the banks. Petitioner also introduced Complainant's time sheets which only showed actual hours worked on the first two weeks of her employment in March 2007 and thereafter listed dates worked and not hours. Also presented were security records from two banks which Petitioner testified related to the in and out times of the cleaning service. There were no times for the period of June 16 through June 30, 2007. Petitioner stated that the failure of Complainant to punch in and out of the alarm system was cause for a complaint from the banks and also stated that the records indicated that when Complainant did punch in and out, she did not spend sufficient time to properly clean the banks.

Petitioner testified that she received many complaints from the banks about Complainant not spending enough time at the banks cleaning and introduced a letter dated April 1, 2007 from one of the banks. Petitioner admitted to owing Complainant her wages and stated that she did not pay at first because she did not have Complainant's address and then did not pay because she did not agree with the amount of wages claimed. Petitioner did not provide Complainant a pay stub or make any required tax deductions from her pay and gave Complainant a Tax Form 1099 for the year 2007.

Complainant did not appear or testify, and DOL counsel represented that the reason for her absence was that she was now living in Texas.

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.

An Employer's Obligation to Maintain Records

An employer's obligation to keep adequate employment records is found in Labor Law § 195 as well as in the New York Code of Rules and Regulations (NYCRR). Specifically, Title 12 of the NYCRR, § 142-2.6 provides, in pertinent 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) the wage rate;
> (4) the number of hours worked daily and weekly …;
> (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
> (10) student classification.
>
> " . . .
>
> "(d) Employers…shall make such records…available upon request of the commissioner at the place of employment."

§ 142-2.7 further provides:

> "Every employer . . . shall furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages."

Therefore, it is an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid, and to provide its employees with a wage statement every time employees are paid. This required recordkeeping provides proof to the employer, the employee and the Commissioner that the employee has been properly paid.

Where an employee files a complaint for unpaid wages with DOL and the employer has failed in its statutory obligation to keep records, the employer bears the burden of proving that the employee was paid. Labor Law § 196-a provides, in relevant part:

> "Failure of an employer to keep adequate records, in addition to exposing such employer to penalties . . . shall not operate as a bar to filing of 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."

In the absence of payroll records, DOL may issue an order to comply based on employee complaints only. In the case of *Angello v. Natl. Fin.Corp.*, 1 AD3d 850 (3d Dept 2003), DOL issued an order to an employer to pay wages to a number of employees. The order was based on the employees' sworn claims filed with DOL. The employer had failed to keep required employment records. The employer filed a petition with the Board claiming that the claims, and therefore the order, were overstated. In its decision on the petition, the Board reduced some of the claims. The court, on appeal, held that the Board erred in reducing the wages since the employer failed to submit proof contradicting the claims. Given the burden of proof in Labor Law § 196-a and the burden of proof which falls on the Petitioner in a Board proceeding, 12 NYCRR 65.30, the court stated that "the burden of disproving the amounts sought in the employee claims fell to [the employer], not the employees, and its failure in providing that information, regardless of the reason therefore, should not shift the burden to the employees" (*Natl Fin.* at 854).

In *Anderson v Mt. Clements Pottery Co.*, 328 U.S. 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."

The *Anderson* Court further opined that the court may award damages to an employee, "even though the result be only approximate. . . [and] [t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [recordkeeping] requirements of . . .the Act" (*Id.* at 688).

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."

FINDINGS OF FACT 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 Board Rule 65.39 (12 NYCRR 65.39).

Having failed to keep the required time and payroll records, Petitioner had the burden

of proving that Complainant was properly paid. Petitioner admitted that Complainant was owed wages but testified that she was owed wages for 8 days and not the 14 days claimed. Petitioner's statements in letters and testimony had many inconsistencies which call into question her credibility and leads the Board to find that she has failed to meet her burden of proof that Complainant was properly paid.

The first inconsistency concerns the number of days worked. In a letter dated September 24, 2007, in response to DOL's claim letter which indicates dates and amounts due, Petitioner alleges that Complainant worked 12 days and does not deny that Complainant worked until July 3, 2007. No mention is made of Complainant leaving her job on June 26. However, in her Petition, dated March 1, 2008, she alleges that Complainant worked 8 days. We do not find that Petitioner's explanation that the discrepancy was due to her failure to consult records in the first instance while replying to DOL, to be a credible explanation. In fact, in the first letter, Petitioner admits that she refused to pay Complainant for her final 12 days worked.

Petitioner is also inconsistent regarding Complainant's pay rate. In her September letter, Petitioner agrees that Complainant was paid a salary of $225 per week. She states that it is based on $14.06 per hour. She then alleges that Complainant worked 1.5 hours per night x 12 nights and was due $253.08 minus $40 which she paid to someone else for overtime. In her Petition, she states that Complainant was paid at the rate of $34 per night and since Complainant worked 8 nights, she is due $34 x 8 or $272.00. If Complainant was supposed to work 3 hours per night, her rate of pay was 34 divided by 3 or $11.34 (not $14.06 as previously claimed). If Complainant should have been paid $225 per week and she worked 6 days per week, her nightly rate should be $37.50. The Board finds that Petitioner's failure to present consistent and credible evidence concerning Complainant's rate of pay is another basis for finding that Petitioner failed to meet her burden of proof as to what Complainant was properly due.

Although Petitioner asserted that Complainant failed to work the required hours and perform the required cleaning, there was no evidence of the precise number of hours that Complainant worked – the bank's security records did not cover the time period in question, had omissions even for days that Petitioner stated that Complainant was working, and accounted for only two of the three banks where Petitioner admitted that Complainant worked. In addition, Petitioner may not make deductions from wages for poor performance. It has long been held that employers are prohibited from making deductions from an employee's wages or wage supplements for inadequate job performance. In *Guepet v. International TAO Systems*, 110 Misc 2d 940; 443 NYS2d 321 (Sup Ct Nassau County 1981), the Court stated, "[N]owhere does [Labor Law § 193] permit an employer to make contemporaneous deductions from wages because an employer failed to perform properly." *See Gortat v. Capala Brothers, Inc.*, 585 FSupp2d 372, 375-376 (EDNY 2008); *Burke v. Steinmann*, 2004 US Dist LEXIS 8930 at *17 (SDNY 2004); *Rivers v. Butterhill Realty*, 145 AD2d 709, 710-711 (3d Dept 1988). "An employer's sole remedy under New York law for an employee's poor performance is termination." *Gortat v. Capala Bros., supra* at 375-376.

For all of the reasons herein stated, the Board finds that Petitioner failed to show that the Wage Order is unreasonable or invalid.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Orders assess civil penalties in the amount of $263.00. 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. Where the violation is for a reason other than the employer's failure to pay wages, benefits or wage supplements found to be due, the order shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand dollars . . . 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."

The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of the civil penalty amount 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 § 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 6, dated February 29, 2008 is affirmed;

2. The Order to Comply under Article 19, dated February 29, 2008, is affirmed; and

2. The Petition for review is denied.

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Anne P. Stevason, Chairman

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J. Christopher Meagher, Member

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Mark G. Pearce, Member

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Jean Grumet, Member

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LaMarr Jackson, Member

Dated and signed in the Office of the
Industrial Board of Appeals,
at Albany, New York,
on June 18, 2009.