STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
MARC E. HOCHLERIN AND ACE AUDIO VIDEO, INC. (T/A ACE AUDIO VISUAL CO., AND ACE COMMUNICATION),	:	
Petitioners,	:	DOCKET NO. PR 08-055
To review under Section 101 of the New York State Labor Law: An Order to Comply with Article 6, dated March 28, 2008,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Hugh Janow, Esq., for Petitioner.

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

Witnesses: Marc E. Hochlerin, Ronald Coaxum, Senior Labor Standards Investigator, Hugh Janow.

WHEREAS:

On April 28, 2008 Petitioners Marc E. Hochlerin (Hochlerin) and Ace Audio Video, Inc. (T/A Ace Audio Visual Co., and Ace Communication) (Ace) filed a Petition with the New York State Industrial Board of Appeals (Board) pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Board Rules) (12 NYCRR part 66), seeking review of an Order to Comply with Article 6 of the Labor Law (Order) that the Commissioner of Labor (Commissioner) issued against them on March 28, 2008.

The Order finds that the Petitioners failed to pay vacation and sick pay to the Claimant, a former employee, in violation of Article 6 of the Labor Law. The Order demands payment of $6,540.67 in unpaid wage supplements for the period from January 1, 2001 to May 1, 2003, interest at the rate of 16% calculated to the date of the Order in the amount of $5,074.84 and a 100% civil penalty in the amount of $6,540.67, for a total amount due of $18,155.51.

The Petition alleges that the Order is invalid and unreasonable because: the claim for unused vacation and sick pay was contrary to the company policy of paying employees their unused vacation and sick pay on their anniversary date, without allowing carryover of days from year to year; the claim was calculated using a base salary in excess of $100,000.00, when Claimant's base salary was only $71,000.00; and the imposition of a civil penalty was unwarranted.

Upon notice to the parties, the Board held a hearing in New York City, New York on January 29, 2009 before Board Member Jean Grumet, the designated hearing officer in this case. Board Chairperson Anne Stevason was also present. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and raise relevant arguments. The Claimant was not present at the hearing.

SUMMARY OF EVIDENCE

Ace, a corporation located in Woodside, New York, was in the business of renting and installing sound and video equipment for its corporate customers. Hochlerin was President of Ace. The company began having financial difficulties after September 11, 2001. In early 2003, Critical Capital Corporation, a venture capital firm, took over the management of Ace, became a shareholder, and took possession of its books and records. Hochlerin credibly testified that when Critical Capital took over the management of Ace, he no longer had voting stock and no longer controlled the company. Critical Capital put Ace into foreclosure, and terminated some of Ace's 123 employees including the Claimant, who had been a salesman at Ace since 1982. Ace was acquired by Doar Industries on May 1, 2003.

On September 28, 2004, the Claimant filed a claim with the Department of Labor (DOL) alleging that a total of $16,147.57 in unpaid wages was owed to him. Attached to the claim was a "Commission Salesperson Recapitulation Sheet" which listed unpaid commissions in the amount of $5,647.57, but did not itemize the remaining $10,500.00 of his claim. In a letter to DOL, in response to a request for information, Claimant stated that he was owed $16,400.00 for 40 unused sick days, vacation, and holiday pay, commissions in the amount of $3,499.45, and $2,050.00 for one week's wages for a week when wages were allegedly held back when Ace changed from a weekly to a bi-weekly payroll. These claims totaled $21,949.45. Claimant based his calculations on an annual salary of more than $100,256.00, although he attached a document to the letter, which stated that his base salary was actually $70,980.00.

In a second letter to DOL, Claimant alleged that he was owed a total of $22,769.45, broken down as follows:

• Vacation (32 days)	$13,120.00
• Sick Days (8 days)	$ 3,280.00
• Holidays Worked (2 days)	$ 820.00
• Commission	$ 3,499.45
• One week held back for transition from weekly to bi-weekly payroll	$ 2,050.00

Hochlerin testified that although Petitioners maintained books and records, Critical Capital had taken possession of them prior to the foreclosure. In response to the DOL's request for records, which occurred over a year after the Critical Capital foreclosure and the subsequent sale of the company to Doar Industries, he obtained some records from Bobby Schwartz, Ace's former Director of Administration, and Jerry Friedland, former President of Ace.

Supervising Labor Standards Investigator Ronald Coaxum (Coaxum) testified that after a District Meeting attended by Petitioners' attorney, Hugh Janow, Hochlerin, and Bobby Schwartz, and after receiving additional correspondence from Janow, the DOL determined that Claimant was only due a total of $6,540.67 based on 109.93 hours of annual leave and 23.31 hours of sick leave at the annual rate of $102,106.00. The remaining claims totaling $16,228.78 for commissions, one week of wages allegedly held back, and holiday pay were not included in the Order.

Hochlerin testified that the Claimant's wife resided in La Jolla, California, and the Claimant made frequent trips to California, particularly during the holidays. Using attendance records from 1997-2001, Hochlerin testified that Claimant had a pattern of taking vacations during specific times of the year. Hochlerin believed that this pattern continued in 2002 and 2003 and that therefore, Claimant would have exhausted all his unused vacation and sick leave. Hochlerin, however, could not specifically remember when or whether Claimant took vacations in 2002 or 2003. Hochlerin also testified that Claimant's base salary was $71,000.00.

Coaxum testified that he reviewed Petitioners' attendance sheets and determined that Claimant accrued more than 120 hours of vacation pay a year, which indicated that vacation pay was carried over from year to year, and was not paid on Claimant's anniversary date. Claimant's yearly attendance sheets also expressly indicated the carryover of vacation and sick pay. Coaxum also testified that the employee handbook stated when vacation pay would be paid, but did not expressly state that an employee could not carry over unused vacation or that unused vacation would be forfeited. Because DOL did not receive evidence which would refute Claimant's contention that he did not receive vacation or sick pay, Coaxum used the best evidence available to calculate unused vacation and sick pay owed -- an August 14, 2002 attendance sheet entitled "Employee Year At A Glance", which was comprised of a calendar for the year 2002 which indicated the vacation days, sick days and holiday days taken by the Claimant as of August 14, 2002 and noted that Claimant was owed 109.93 hours of vacation pay and 23.31 hours of sick pay.

GOVERNING LAW

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 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 rate, and gross and net wages paid. (Labor Law §§ 195 and 661, and 12 NYCRR 142-2.6.) Employers are required to keep such records open to inspection by the Commissioner or her designated representative. *Id.*

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. National Finance Corp.*, 1 AD3d 850 [3d Dept 2003]). 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. 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."

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."

Vacation Pay and Sick Pay

Labor Law § 195.5 provides:

> "Every employer shall notify his employees in writing or by publicly

> posting the employer's policy on sick leave, vacation, personal leave, holidays and hours."

An employee must be paid for accrued vacation upon termination unless the employer has, through a written policy or agreement, specified that employees forfeit accrued vacation pay upon termination. In *Matter of the Petition of Center for Financial Planning, Inc.*, PR 06-059 (January 28, 2008), the Board found that Petitioner's written policy did not support its position that unused vacation had been forfeited because the employer's written policy "contains no express provision that employees forfeit their vacation, sick and personal leave when their employment with the Petitioner ends" (*see also Gennes v. Yellowbook*, 23 AD2d 520, 522, 806 NYS2d 646 [2nd Dept 2005]; *Paroli v. Dutchess County*, 292 AD2d 513, 739 NYS2d 202 [2d Dept 2002]).

Civil Penalties for Failure to Pay Wages

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."

FINDINGS

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

We reject Petitioners' contention that the Order is invalid and unreasonable because the claim for unused vacation and sick pay was contrary to the company policy of paying employees for their unused vacation and sick pay on their anniversary date without allowing carryover from year to year. The Employer Handbook states in relevant part:

> "Full-time employees are entitled to a one-week vacation during the first year of employment and a two-week vacation thereafter. At the 10th year of employment employees are entitled to three- week vacation. Vacation days are cumulative (i.e. for every 10.4 weeks worked, an employee earns 1 vacation day during the first year of employment. Thereafter, for every 5.2 weeks worked, an employee earns 1 vacation day.) Unused vacation days will be paid at the end of the employee's anniversary date.

We find that the employee handbook contains no provision that expressly states that unused vacation pay will be forfeited if not used, nor is there any express prohibition against carrying over vacation pay from year to year. Additionally, as Coaxum testified, Claimant's attendance records reflect that his unused vacation and sick pay was carried over from year to year.

We credit the Petitioners' assertion that Claimant's base salary was $70,980.00. Claimant provided the DOL with documentation which showed that his base salary was $70,980.00.

We reject Petitioners' contention that the Commissioner's reliance on the Claimant's claim was unreasonable because the unavailability of its books and records, due to the foreclosure, made it impossible for the Petitioners to prove that Claimant was paid all of the unused vacation and sick pay claimed. The Third Department held in *Angello v. National Finance Corp.*, 1 AD3d at 854, that if the employer does not provide the records required under the Labor Law, "regardless of the reason therefore", the presumption favoring the Commissioner's determination based on the employees' complaints applies (*Id.* at 854).

Having failed to produce accurate time and payroll records required by the Labor Law, DOL's calculation of vacation pay and sick pay (at the base salary of $70,980 rather than $100,256.00) must be credited unless the Petitioners met their burden to prove that the employees were paid the disputed amounts (*see, e.g. Angello v. National Finance Corp.*, 1 AD3d 850). This burden is not an impossible one. However, in this case, Petitioners' inference based on the pattern of past vacations, without any direct proof for the years 2002 and 2003, was insufficient to meet such burden. We therefore affirm the Commissioner's determination, as modified using the base salary of $70,980.00.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Order under review includes a 100% civil penalty against the Petitioners. Petitioners argue that the assessment of the penalty is not reasonable or valid because it was based solely on the failure to pay the claim. Coaxum admitted that the case was not egregious, that Petitioners have no history of previous violations, and that none of Petitioners' 122 other employees filed a claim with DOL. In addition, the Petitioners fully cooperated in the investigation and were successful in significantly reducing the claims, and provided colorable defenses to the claims asserted (*see Business Computer Answers, Inc.*, Board Docket PR 06-053 [April 23, 2008]). Although we find that that part of the Order demanding the payment of wages is reasonable we recognize that the Order was based on a failure to maintain records, and that the claim was filed after there were two changes in

ownership of the company (which occurred nearly six years ago). Given the above factors, we find that that part of the Order requiring the payment of a100% penalty is unreasonable. We, therefore, reduce the penalty to 10%.

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 Order to Comply with Article 6 of the Labor Law dated March 28, 2008 is modified to direct payment to the Claimant of the sum of $4,547.48 in unpaid vacation pay and sick pay, together with interest at 16% calculated to the date of the Order; and
2. The Order to Comply is further modified with respect to the imposition of a 100% civil penalty, which is reduced to 10%.

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
March 25, 2009.