STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
PAUL FLANAGAN AND FLANAGAN DESIGN AND DISPLAY, INC.,	:	
Petitioners,	:	DOCKET NO. PR 08-067
To review under Section 101 of the New York State Labor Law: Two Orders to Comply with Article 6, dated May 9, 2008,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Gregory Hoover, Sr., Esq., for Petitioner.

Maria L. Colavito, Counsel to the New York State Department of Labor, Benjamin A. Shaw of Counsel, for Respondent.

WITNESSES

Paul Flanagan; Walter Pincus; and Linda Smarra, Department of Labor Supervising Labor Standards Investigator.

WHEREAS:

On July 8, 2008 Petitioners Paul Flanagan (Flanagan) and Flanagan Design and Display, Inc. (Flanagan Design) 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 (Rules) (12 NYCRR Part 66 et seq.), seeking review of two Orders to Comply with Article 6 of the Labor Law that the Commissioner of Labor (Commissioner) issued against them on May 9, 2008.

The first Order (Wage Order) finds that the Petitioners failed to pay wages to the Claimant, Walter Pincus (Claimant), a former employee, in violation of Article 6 of the Labor Law. The Order demands payment of $6,000.00 in unpaid wages for the period from October 17, 2007 to November 6, 2007, interest at the rate of 16% calculated to the date of the Order

in the amount of $493.94, and a 50% civil penalty in the amount of $3,000.00, for a total amount due of $9,483.94. The second Order (Wage Supplement Order) finds that the Petitioners failed to pay wage supplements (expenses) in violation of Article 6 of the Labor Law. The Wage Supplement Order demands payment of 7,842.15 in unpaid wage supplements for the period from February 15, 2007 to October 31, 2007, interest at 16% calculated to the date of the Order in the amount of $653.15, and a 50% civil penalty of $3,921.00, for a total amount due of $12,416.30.

The Petition alleges that the Wage Order is invalid and unreasonable because Claimant did not bring in 1.5 million dollars in sales as expected, yet he continued to receive his weekly salary and had already been paid $72,000.00 for the period of February through October 2007. The Petition alleges that the Wage Supplement Order is invalid and unreasonable because Claimant claimed expenses he was not entitled to for a period of nearly six weeks, when he "took time off for vacations, illnesses, yet he would continue to submit expense sheets expected to be reimbursed for expenses not incurred while working." In addition, the Petition alleges that the Petitioner never received verification and receipts of the expenditures that Claimant claimed he was entitled to.

Upon notice to the parties, the Board held a hearing on April 14, 2009 before Board Member Jean Grumet, the designated hearing officer in this case. Each party was afforded a full opportunity to present testimony and documentary evidence and to examine and cross-examine witnesses, and raise relevant arguments.

SUMMARY OF EVIDENCE

Flanagan Design, a corporation located in Middletown, New York, was in the business of manufacturing point of purchase displays for stores. These displays were made of sheet metal and powder-coated wire tubing and held products sold in gas stations and other retail facilities. Claimant was hired as a salesperson in February 2007, at a time when the business was floundering due to imports from China. According to Flanagan, Claimant previously worked for one of his competitors and brought in three to four million dollars in sales, and Flanagan expected that the Claimant would produce one to one and a half million dollars in sales for Flanagan Design. It is undisputed that when Claimant was hired, the parties agreed to written "guidelines and expectations" (agreement), which provided, *inter alia*, that Claimant would receive a weekly salary of $2,000.00 payable each Friday, and would be reimbursed each month for expenses, including an $850.00 per month car allowance (which included car maintenance and insurance), as well as office, phone, fax, supplies, tolls, cell phone, gas, travel, and equipment, for which Claimant would submit receipts.

Flanagan testified that when he realized that the expected 1.5 million dollars in sales never materialized and that Claimant generated only $200,000.00 in sales, he told Claimant that he was no longer able to pay him a weekly salary, and could continue to employ him on a commission basis only. Flanagan claimed he could not remember if he told Claimant he would have to work solely on commission before or after the three-week period at issue in the Wage Order. When later asked about the status of Claimant's employment during the three-week period following the issuance of Claimant's last paycheck on October 19, Flanagan replied, "I have no idea. He wasn't at my office. He didn't bring in any sales. I have no idea

what he was doing. That is like if I'm asked if I know what you were doing." Flanagan also testified that on June 29, 2007, he issued a check in the amount of $3400.00 to reimburse Claimant for some of his expenses, but admitted that he did not reimburse Claimant for any other expenses.

Claimant testified that he was last paid $2,000.00 a weekly salary on October 19, 2007. During the three weeks following October 19, Flanagan was on vacation and Petitioners were short staffed. At Flanagan's behest, Claimant worked at Flanagan Display each day, although he would have preferred doing his regular sales. When Claimant did not receive his paycheck on Friday, October 26, he approached Flanagan's wife, who handled payroll. She told him that she was not aware of why there was no check and that he would have to wait until Flanagan returned to find out. Claimant continued working, and was not paid the following Friday either. When Flanagan returned on November 7, Claimant approached him, but Flanagan was unavailable for conversation. On November 8, Flanagan told Claimant that he could not afford to pay him and that if he wanted to continue to work at Flanagan Designs, he would have to go on straight commission, which Claimant refused. Claimant testified that he is owed three weeks of wages for the payroll periods ending October 23, October 30, and November 6, 2007.

Claimant testified that he submitted expense reports and receipts on a monthly basis, pursuant to the parties' agreement. Although he was supposed to be reimbursed for his expenses on a monthly basis, Claimant received only one check and that was on June 29, 2007, in the amount of $3,400.00. After June 29, he was never reimbursed for monthly expenses although he continued to submit his monthly expense reports to Flanagan's wife.

Supervising Labor Standards Investigator Linda Smarra testified about the investigation of Petitioners by the Department of Labor (DOL) that led to the issuance of the Orders. DOL's investigative records were entered into evidence. The records included claims for unreimbursed expenses that Claimant incurred for each month from February 2007 through October 2007. Having heard the Claimant's testimony that he had received a check for $3,400 in reimbursement of expenses, Smarra testified that the Wage Supplement Order should be reduced by $3,400. Based on the testimony of Claimant and Smarra, the Commissioner, through counsel, made an application to reduce the Wage Supplement Order by $3,400.00.

DOL's investigative records show that Claimant incurred expenses in each month during the period February through October 2007 as follows: $930.76 (February); $1,314.91 (March); $1,371.49 (April); $1,276.69 (May); $1,325.24 (June); $1,302.88 (July); $1,220.99 (August); $1,238.27 (September); and $1,263.77 (October), for a total of $ 11,245.00 in expenses that Claimant advanced on Petitioners' behalf.

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 Rule 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 Petitioners to prove that the Orders under review are not valid or reasonable.

Article 6 – Payment of Wages

Article 6 of the Labor Law, which is entitled "Payment of Wages," deals with numerous aspects of wages, including frequency of payments (§191), deductions from wages (§193), and benefits or wage supplements (§198-c). "Wages" are defined in §190 (1) for most purposes as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission, or other basis. The term 'wages' also includes benefits or wage supplements. . . ."

Labor Law §191 (1) (d) provides that a worker "shall be paid the wages earned in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance by the employer." Pursuant to Labor Law §191(2), "[n]o employee shall be required as a condition of employment to accept wages at periods other than as provided in this section."

Labor Law §198-c provides in relevant part:

> "1. In addition to any other penalty or punishment otherwise prescribed by law, any employer who is party to an agreement to pay or provide benefits or wage supplements to employees … and who fails, neglects or refuses to pay the amount or amounts necessary to provide such benefits or furnish such supplements within thirty days after such payments are required to be made, shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in section one hundred ninety-eight-a of this article.
>
> "2. As used in this section, the term 'benefits or wage supplements' includes, but is not limited to, reimbursement for expenses. . . ."

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, testimony, arguments, and documentary evidence, makes the following findings of fact and law pursuant to the provisions of Rule 65.39 (12 NYCRR 65.39).

We find that the Petitioners violated Labor Law §191 by failing to pay Claimant $2,000.00 per week for the three-week period of October 17 through November 6, 2007 for a total of $6,000.00. Labor Law §191(1) (d) requires that an employee be paid the wages earned "in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance by the employer." The parties' agreement provided that Claimant would receive a weekly salary of $2,000.00, payable each Friday. It is undisputed that the last paycheck received by Claimant was dated October 19, 2007. We credit Claimant's testimony that he continued to work at the behest of the Petitioners for the following three weeks for which he was never compensated. Claimant's testimony was specific as to events and well corroborated by documentary evidence. Petitioner Flanagan's testimony, on the other hand, was vague and contradictory. Flanagan equivocated about the details of the conversation in which he asked Claimant to work on a commission basis, and claimed he could not remember whether the conversation occurred before or after the three-week period in question. Flanagan's testimony, "[h]e wasn't at my office. He didn't bring in any sales. I have no idea of what he was doing," contradicted his own attorney's opening statement that "Claimant remained on the premises. . . He did absolutely nothing for three weeks, sat in the office and did nothing."

The Petitioners' contention that Claimant is not entitled to three weeks of wages because he did not generate the anticipated volume of sales is unavailing because it is not a legally valid reason to withhold wages. It has long been held that employers are specifically prohibited from making deductions from an employees' wages or wage supplements for assertedly inadequate job performance. In *Guepet v Intl. TAO Sys., Inc.,* 110 Misc 2d 940, 941 (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 employee failed to perform properly." *See Gortat v Capala Brothers, Inc.,* 585 F Supp2d 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* 375-376.

We find that Petitioners violated Labor Law §198-c by failing to reimburse Claimant for $7,842.15 in expenses. The Petition alleged that Claimant submitted expense reports for a six-week period when he was on vacation or ill, and that verification and receipts were never provided in support of any of Claimant's expense reports. Petitioners provided no evidence in support of either of these allegations and thus did not meet their burden of proof.

Claimant credibly testified that he submitted monthly expense reports and receipts to Flanagan's wife, the person who was undisputedly in charge of payroll, but that, contrary to the requirements of the parties' agreement, he was not reimbursed on a monthly basis. Claimant testified that on June 29, 2007, he received one reimbursement check for several months' expenses, and although he continued to submit monthly expense reports and receipts, he never received reimbursement for all of the expenses that he advanced.

The record evidence shows that Claimant expended $11,245.00 on behalf of Petitioners and was reimbursed for only $3,400.00 of that amount, leaving $7,845.00 due to the Claimant.[1] On this basis, the Board denies the Commissioner's application to reduce the amount of the Wage Supplement Order by the $3,400.00 that Petitioners paid Claimant in partial reimbursement of his expenses. To grant the Commissioner's application would erroneously credit Petitioners for two payments of $3,400.00 each to Claimant when they made only one such payment to him.

CIVIL PENALTIES

The Wage Order and Wage Supplement Order additionally assessed a civil penalty in the amounts of $3,000.00 and $3,921.00, respectively. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalty amount set forth in each of these Orders are proper and reasonable in all respects.

INTEREST

Labor Law §219 (1) provides that when the Commissioner determines that wages are due, 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."

[1] This amount is $2.85 more than the amount found due him in the Wage Supplement Order.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The two Orders to Comply with Article 6 of the Labor Law dated May 9, 2008 under review be, and the same hereby are, affirmed; and

2. The Petition be, and the same hereby 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 J. Jackson, Member

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