STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: DAVID FENSKE (T/A AMP TECH AND DESIGN, INC.), Petitioner, To Review Under Section 101 of the Labor Law: Two Orders to Comply with Article 6 of the Labor Law, each dated April 20, 2007, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 07-031 RESOLUTION OF DECISION

APPEARANCES

Goldberg Segalla LLP (Richard A. Braden of counsel), for petitioner.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin A. Shaw of counsel), for respondent.

WITNESSES

David Fenske for petitioner; Jose R. Diaz, Supervising Labor Standards Investigator Andrew Cahill, and Barbara Marek for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on June 21, 2007, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) against the petitioner David Fenske (T/A AMP Tech and Design, Inc. formerly known as AMP Technologies, Inc.) on April 20, 2007. Upon notice to the parties a hearing was held on June 15, 2010 in Buffalo, New York, before Board Member LaMarr J. Jackson, the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to submit post-hearing briefs.

The first order is to comply with Article 6 of the Labor Law (wage order). It finds that the petitioner failed to pay wages in the amount of $17,386.44 to numerous named employees between May 2, 2005 and June 24, 2005. The wage order further finds interest due at the rate of 16% calculated to the date of the order, in the amount of $5,067.23, and assesses a civil penalty in the amount of $34,722.00, for a total amount due of $57,225.67.

The second order is also to comply with Article 6 of the Labor Law (supplements order). It finds that the petitioner failed to pay wage supplements in the amount of $15,303.52 to numerous named employees between July 1, 2002 and June 30, 2005. The supplements order further finds interest due at the rate of 16% calculated to the date of the order, in the amount of $7,051.19, and assesses a civil penalty in the amount of $30,607.00, for a total amount due of $52,961.71.

The petitioner alleges that the orders are invalid and unreasonable, because he was not an employer within the meaning of Article 6 of the Labor Law during the relevant time period, and because the respondent was preempted by the National Labor Relations Act from issuing the orders where the wages and wage supplements alleged due and owing were the subject of a collective bargaining agreement. The petitioner further alleges that the Commissioner violated his due process rights by issuing the orders without proper notice and an opportunity to be heard.

SUMMARY OF EVIDENCE

Robinson Fiddler's Green

Petitioner David Fenske was the owner and president of Robinson Fiddler's Green, a corporation that ceased operations in 2001. Fenske testified that when Robinson Fiddler's Green ceased operations, its employees were employed for a brief time by EGW Temporary Services, and then were employed by AMP Technologies, Inc., a company owned by Steven Fenske, David Fenske's brother. David Fenske testified that AMP Technologies assumed the responsibility to pay the vacation benefits accrued by its employees for the period they had worked for Robinson Fiddler's Green. Barbara Marek, a former employee of Robinson Fiddler's Green, AMP Technologies, and AMP Tech and Design, testified that when Robinson Fiddler's Green changed to AMP Technologies, the vacation carried over, and that David Fenske was part of the meetings regarding the vacation policy.

AMP Technology, Inc.

David Fenske testified that he worked for AMP Technology, Inc. from 2001 to 2005 in sales, procurement, product development, and financing. Stephen Fenske was the president and production manager at AMP Technology, Inc., controlled production, and had the sole authority to hire and fire employees, and to set employee schedules. David Fenske denied having any authority to hire or fire employees of AMP Technology, Inc. Barbara Marek, however, testified that David Fenske was in charge of "everything in the office" at AMP Technology, and that Steven reported to him.

David Fenske testified that from 2003 to 2004, AMP Technology began to have financial trouble. Specifically, Fenske testified that AMP Technologies and Stephen Fenske were no longer able to obtain credit to buy material.

AMP Tech and Design, Inc.

David Fenske testified that in January 2005, he formed AMP Tech and Design, Inc., a Delaware corporation, in order to obtain credit and purchase materials. AMP Tech and Design operated in the same building as AMP Technologies had operated, used the same machines, and had the same employees. AMP Tech and Design, Inc. also manufactured some, but not all, of the same products that AMP Techologies had manufactured. There was no agreement, according to David Fenske, for AMP Tech and Design to assume the wages and supplements owed to employees of AMP Technologies. Barbara Marek, however, disagreed stating that she had accrued 18 days of vacation at the time AMP Technologies had stopped operating, and was told that if she requested vacation time and did not get it, that she would be paid for it, which she was not. Fenske testified that there was a two week shutdown between when AMP Technologies ceased operations and AMP Tech and Design started. Fenske testified that he was the sole shareholder and president of AMP Tech and Design, and there were no other corporate officers. Furrthermore, Fenske was the sole signatory on the corporate bank account and the only person at the firm who signed paychecks.

Fenske testified that his role at AMP Tech and Design was sales and financing. David Fenske testified that he did not direct employees' work, supervise employees on a daily basis, control work schedules, or maintain employment records. Fenske testified that Stephen Fenske was responsible for the production employees and had the authority to hire and fire. David Fenske had authority over Stephen Fenske and could overrule decisions made by Stephen Fenske, although this never happened, and retained the sole authority to terminate Stephen Fenske, although such authority was never exercised. Barbara Marek testified that the employees reported to Stephen Fenske, who then reported to David Fenske.

Barbara Marek testified that in March 2005, there was a problem with the paychecks, and she along with a group of other employees told David and Steven Fenske that if they were not paid that day, which was a Friday, they would not come to work on Monday. The employees received their paychecks that day as requested.

David Fenske testified that in May and June 2005, he became aware that AMP Tech and Design did not have funds to pay wages owed to employees. Barbara Marek testified that on June 25, 2005, everybody was laid off, and that she was still owed wages and supplements[1].

David Fenske testified that the employees of AMP Tech and Design were represented by IUE-CWA Local 396, and that a collective bargaining agreement existed between the union and AMP Tech and Design. Fenske did not have primary responsibility to deal with the union, but human resources manager John Kelly informed Fenske that

[1] As part of the settlement of a criminal matter brought by the New York State Attorney General against David Fenske, Barbara Marek received $1,148.40 in unpaid wages.

grievances had been filed regarding vacation pay. Those grievances have never been arbitrated.

Fenske testified that he had no prior history of Labor Law violations and that the Department of Labor never contacted him to get his "side of the story."

DOL's investigation

Supervising Labor Standards Investigator Andrew Cahill testified that DOL received numerous claim forms alleging the failure of AMP Tech and Design and the petitioner to pay wages and supplements. Cahill stated that the petitioner was never personally contacted by DOL and that it was "fairly obvious there was a failure to pay multiple people wages." DOL named the petitioner as an employer because some of the claimants indicated that he was responsible for payment of wages, he was the signatory on AMP Tech and Design's corporate bank account, and the corporation was not a recognized legal entity in New York.

Cahill further testified that he was aware that the claimants were represented by a union. DOL proceeded despite the existence of a collective bargaining agreement, because there was no need to interpret the contract. Cahill stated that if there had been any need for interpretation, DOL would have recognized that most likely the case was preempted by the National Labor Relations Act. Specifically, Cahill testified that he reviewed Article 16 of the collective bargaining agreement that had been attached to one of the claim forms, and concluded that no contract interpretation was required beyond determining whether a particular claimant was due "x amount of vacation days as defined by these agreements . . . ."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to the provision of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39).

The wage order

David Fenske was an employer under Article 6 of the Labor Law

At the outset, we note that the burden of proof in a proceeding before the Board is on the petitioner to show that the order is invalid or unreasonable (Labor Law § 101, 103; 12 NYCRR 65.30). The petitioner does not challenge that the wages are owed, but alleges that he is not liable for the wages because he was not an employer as defined by Article 6 of the Labor Law. We disagree.

The term "employer" as used in Article 6 of the Labor Law means "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

The federal Fair Labor Standards Act, like the New York Labor Law defines "employ" to include "suffer or permit to work" (29 USC § 230 [g]), and "the test for

determining whether an entity or person is an 'employer' under the New York Labor Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v. The New Silver Palace Rest., Inc.*, 272 FSupp2d 314, 319 n6 [SDNY 2003]).

In *Herman v. RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir. 1999), the Second Circuit Court of Appeals stated that the test used for determining employer status by explaining that:

> "Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).

When applying this test, "no one of the four factors standing alone is dispositive. Instead the 'economic reality' test encompasses the totality of the circumstances, no one of which is exclusive." (*Id* [internal citations omitted]).

In a similar case of a factory closing without meeting its final payroll, *Matter of Franbilt, Inc. et al.*, PR 07-019 (July 30, 2008), we applied this test and found an owner and sole shareholder who was aware of the financial difficulties facing his company, and who had ultimate authority with respect to hiring and firing, even if unexercised, liable as an employer where his attempts to secure funds to keep the factory open demonstrated that he controlled the conditions of employment of the company's employees. As in *Franbilt*, we find here that David Fenske was an employer from January 1, 2005 to June 25, 2005, because he was the owner and sole shareholder and officer of AMP Tech and Design, Inc., the only signatory on the corporate bank accounts, signed paychecks, was responsible for financing, was aware in May and June 2005 that the company did not have funds to make payroll, and had ultimate authority over the management decisions of his brother, Stephen Fenske, even if that authority was never exercised (*see Donovan v Maxim Industries, Inc.*, 552 FSupp 1024 [D. Mass. 1982] [individual with final decision making power with regard to financial matters and who supervised cash flow of company on day to day basis, and involved in decision to continue to running plant when payroll could not be met, was employer]; *McLaughlin v Lunde Truck Sales, Inc.*, 714 FSupp 920, 923 [N. Dist. Ill. 1989] [individual who controls corporate operations is an employer under the Fair Labor Standards Act]).

Therefore, we find the Commissioner's determination that the petitioner was an employer during the time period covered by the wage order was reasonable; however, we note that evidence was presented of a settlement between the Attorney General and the petitioner of a criminal matter involving the same subject matter and modify the wage order to credit the petitioner with any wages already paid as a result of such settlement.

The civil penalties are affirmed

The wage order imposes a 200% civil penalty in the amount of $34,722.00 against the petitioner. Labor Law § 101 (2) provides that any objections to the order not raised "shall be deemed waived." The Commissioner argues that the petition does not allege that the civil penalty is invalid or unreasonable, and therefore any such claim has been waived. The petitioner claims that the petition, in seeking revocation of the orders as unreasonable, includes the civil penalties. We disagree. The petition does not specifically challenge the imposition of the civil penalty by contesting the statutory grounds for imposing the penalty, the amount charged, or address the penalties at all beyond alleging that the orders are unlawful and must be revoked. The Board's rules require the petitioner to "state clearly and concisely the grounds on which the matter to be reviewed is alleged to be invalid or unreasonable, omitting conclusions of fact or law" (Board Rules 66.3 [e] [12 NYCRR 66.3 (e)]). The petitioner did not clearly and concisely plead with respect to the civil penalty, nor raise the issue at any time prior to hearing. Accordingly, the civil penalty was not objected to and is affirmed.

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." Therefore, the interest imposed by the wage order is affirmed.

The supplements order

The petitioner alleges that he is not liable for the supplements order because he was not an employer, and because the subject matter of the order is preempted by federal law. We find that the petitioner met his burden of proof to show that he was not an employer during the time period covered by the majority of the order, and that during the time period he was an employer, no agreement existed to pay unused vacation wages to his employees.

The supplements order finds that the petitioner failed to pay $15,303.52 in vacation pay to fifteen named employees from July 1, 2002 to June 30, 2005, with all but one of the employees allegedly owed unpaid vacation wages for a time period prior to January 1, 2005.

The petitioner testified that from 2001 to January 1, 2005, AMP Technologies, Inc. employed the employees named in the supplements order. He further testified that he was not an owner, shareholder or officer of AMP Technologies, and did not have the authority to hire or fire employees, or to direct any of the named employees how to perform their jobs. He credibly described his role as sales, procurement, product development, and financing. He credibly testified that his brother, Stephen Fenske, was the president and production manager at AMP Technologies, Inc. and as such had the authority to hire, fire, and supervise employees. The only evidence available to establish the petitioner as an employer, was the vague testimony of Barbara Marek that the petitioner was "in charge of everything" and "Steve reported to him," and various claim forms and supplemental depositions filed by

employees listing either David Fenske, Stephen Fenske, or both, as a responsible person at AMP Tech and Design, Inc. (as opposed to AMP Technologies, Inc.). The petitioner having testified that he did not direct or control the employees from 2001 to January 1, 2005, we do not find the Commissioner's evidence sufficient to rebut such testimony. Therefore, we do not find that as a matter of economic reality that the petitioner was an employer from July 1, 2002 to June 30, 2005. Therefore, he is not liable for wage supplements during that time period.

However, as we found above, the petitioner was an employer under Article 6 of the Labor Law for the period from January 1, 2005 to June 30, 2005. One of the employees listed on the supplements order is allegedly owed vacation benefits for that time period. We find that the petitioner met his burden to prove that there was no agreement for vacation benefits for employees of AMP Tech and Design.

The petitioner testified that in 2001 AMP Technologies assumed the vacation pay obligations of Robinson Fiddler's Green, a prior corporation owned by the petitioner. He also credibly testified that no such agreement existed between AMP Tech and Design and AMP Technologies. The only testimony produced by the Commissioner to rebut the petitioner's testimony was the vague testimony of Barbara Marek that she had 18 days of accrued vacation when AMP Techologies stopped operating and was told that if she requested vacation time, and was not given it, that she would be paid for it. We do not know who told her this or when. Such vague testimony cannot support a supplements order for over $15,000.00.

The Commissioner apparently relied on a collective bargaining agreement in determining that vacation wages were due, and to be sure, there was testimony that a collective bargaining agreement existed[2], but no collective bargaining agreement is in evidence. Additionally, a copy of a vacation policy signed by the union and the company on December 14, 2001, was attached to at least one of the claim forms filed with the Department of Labor. However, that vacation policy on its face did not apply to AMP Tech and Design, and references a June 28, 2002 "vacation reopener" that is not in the record. Similarly, a signed memorandum of agreement between AMP Technologies and the union signed November 11, 2003, is in the record, and appears to modify the prior vacation policy but predates the incorporation of AMP Tech and Design. Therefore, the supplements order is unreasonable.

The petitioner also argues that the supplements order is invalid because the petitioner's vacation policy was the subject of collective bargaining, and therefore preempted by the National Labor Relations Act. However, we do not need to decide this issue since, as discussed above, the petitioner was not an employer from July 1, 2002 to January 1, 2005, and therefore not liable for any unpaid supplements during that time period, and there is no evidence of the terms of any vacation policy from January 1, 2005 to June 30, 2005. To the extent that the Commissioner may be arguing that AMP Tech and Design, Inc., and therefore the petitioner, are successors of the agreement between the union and AMP Technologies, that would require an interpretation of the collective bargaining

[2] We note that the petitioner attempted to enter what it considered the collective bargaining agreement into evidence, but that the Commissioner objected to it being characterized as a collective bargaining agreement. Significantly, the pages relating to a vacation policy were not signed by the union or the company.

agreement's successor clause. We believe we are preempted from making such interpretation since it would go beyond analyzing Labor Law claims that are legally independent from the agreement (*see e.g. Livadas v Bradshaw*, 512 US 107 [1994]; *Vera v Saks & Co.*, 335 F3d 109 [2d Cir 2003]; *Foy v Pratt & Whitney Group*, 127 F3d 229 [2d Cir 1997]).

Petitioner's constitutional claims

The petitioner claims that he was deprived of due process, because the orders were issued without prior notice to him, and, therefore the Commissioner did not provide him with a notice or a reasonable opportunity to be heard. We reject the petitioner's claim that the Commissioner violated his constitutional right to notice and an opportunity to be heard, because the proceeding before the Board, satisfies due process. We have consistently held that due process and notice requirements are satisfied by an employer's right to appeal the orders to the Board (*see Matter of Fischer,* PR 06-099 [April 23, 2008]).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is modified to credit the petitioner with the amount of wages already paid as part of a settlement with the Attorney General, but is otherwise affirmed in all respects;

2. The supplements order is revoked in its entirety; and

3. The petition for review be, and the same hereby is, denied in part, and granted in part.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at Albany, New York, on
December 14, 2011.