

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
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ROBERTO A. BAUTISTA,	:
	:
Petitioner,	:
	:
	DOCKET NO. PR 09-105
To Review Under Section 101 of the Labor Law:	:
An Order to Comply with Article 6 of the Labor Law,	: <u>RESOLUTION OF DECISION</u>
dated April 10, 2009,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
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APPEARANCES

Pedowitz & Meister, LLP, Robert A. Meister of Counsel, for Petitioner.

Maria L. Colavito, Counsel, New York State Department of Labor, Benjamin T. Garry of Counsel, for Respondent.

WITNESSES

Roberto A. Bautista for the Petitioner; Supervising Labor Standards Investigator Ronald Coaxum and Yohanna Casado for the Respondent.

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on April 29, 2009. Upon notice to the parties a hearing was held on July 29, 2010 in New York, New York, before Devin A. Rice, Associate Counsel to the Board and the designated Hearing Officer in this proceeding. 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 order to comply with Article 6 (order) under review was issued by the respondent Commissioner of Labor (Commissioner) on April 10, 2009 against petitioner Roberto A. Bautista (Bautista) and Maurice A. Richardson and M. Rich, Inc. (T/A Rich Knowledge Institute) (collectively, Rich Knowledge Institute). Mr. Richardson and M. Rich, Inc. did not appear in this proceeding. The order directs compliance with Article 6 and payment to the Commissioner for wages due and owing to three claimants in the amount of \$16,938.00 for the time period from August 16, 2003 through December 17, 2003, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of \$14,274.32, and assesses a 50% civil penalty in the amount of \$8,469.00, for a total amount due of \$39,781.32.

SUMMARY OF EVIDENCE

Testimony of Roberto A. Bautista

Petitioner Roberto A. Bautista testified that on or about March 2003 he was hired by Maurice Richardson as Director of Education at the Rich Knowledge Institute, a business school that was located in Queens, New York and was in operation from on or about March 2003 to December 2003. According to Bautista, Richardson was the owner and manager of the Rich Knowledge Institute. Bautista was not a shareholder of M. Rich, Inc., the corporation that operated Rich Knowledge Institute, nor was he an officer, director, or partner in the business.

Bautista's duties as Director of Education included designing the curriculum for the computer classes, scheduling teachers for classrooms, ensuring that there were books for the students, and reviewing resumes of prospective teachers and referring them to Richardson for possible hire. Additionally, Bautista taught computer and GED (general equivalency diploma) courses at the school.

Bautista testified that he met Richardson a few months before the Rich Knowledge Institute opened, and that Richardson was looking for somebody to "work with the teachers" at a new school he was opening. At that time, Richardson was already operating a medical billing school in Queens, New York. Bautista agreed to work for Richardson with the terms of his compensation to be agreed once the school "[got] going." Bautista testified that his salary was never determined, and he was never compensated for any of the work he did at the school.

Bautista testified that he did not have the authority to hire teachers or set their salaries, although he did screen the resumes of applicants for computer teaching jobs and conduct initial interviews in some cases. Bautista stated that Richardson did all hiring and determined the salaries and other terms of employment for the employees of the Rich Knowledge Institute. Bautista testified that he had absolutely no role in the hiring of the support staff or teachers outside the computer department. Bautista distributed pay envelopes to the teachers on the occasions when Richardson was not present to do so, but he did not prepare the checks and had no authority to sign checks on behalf of the school.

Bautista testified that he was familiar with claimant Sohail Hameed because he had reviewed Hameed's resume, conducted an initial interview, and informed Richardson that Hameed seemed like a good teacher. Richardson spoke to Hameed afterwards and hired him. Bautista discussed curriculum with Hameed and Hameed reported student grades to Bautista and Richardson. Hameed worked at the school until it closed in 2003. Bautista testified that on or about August 2003, Hameed complained to him that Richardson had not paid him, and Bautista told him he would discuss it with Richardson because it was "out of [Bautista's] hands."

Bautista testified that he also knew Sohail Hameed's cousin, Khurram, who also worked as a computer teacher at the Rich Knowledge Institute. Bautista reviewed Khurram's resume, but did not interview him. Bautista testified that Khurram never approached him about not being paid.

Bautista also testified that he knew Yohanna Casado because she had worked as a receptionist in the school administration. Bautista testified that Casado did not do work for him or for the other teachers and that he had no role in hiring her.

Bautista testified that he did not become aware of DOL's investigation of the Rich Knowledge Institute until he received a letter from Supervising Labor Standards Investigator Ronald Coaxum in late 2008. Bautista denied receiving any correspondence from DOL prior to that date.

Testimony of Supervising Labor Standards Investigator Ronald Coaxum

Supervising Labor Standards Investigator Ronald Coaxum testified that he did not become involved in the investigation of Rich Knowledge Institute until "probably" 2007 or 2008. Coaxum decided to "take responsibility" for the investigation after reviewing old cases and determining that the investigation of Rich Knowledge Institute was "not moving along, and [he] wanted it completed." Coaxum explained that Atul Sheffey was originally assigned to work on the case, but he had "left to take another job."

The case was originally started in February 2004, when DOL received three claims for unpaid wages from former employees of the Rich Knowledge Institute. The claim forms each list Richardson and Bautista as "responsible persons" at the firm, and further name Bautista as a "superintendent, manager or foreman." Coaxum testified that DOL's case file contains a copy of a letter from Sheffey to Bautista at Bautista's home address, dated September 30, 2004, notifying Bautista of the claim against him and requesting a response. Coaxum further testified that there was no indication in the case file that the letter has been returned by the post office as undeliverable, but conceded that there was no proof of mailing contained in the file such as an affidavit of mailing or a notation in the case management system.

On January 2, 2009, Coaxum mailed a "recapitulation sheet" to Bautista and Richardson stating the amount of wages due and advising that an Order to Comply would be

issued if DOL's findings were not contested in writing or in person by January 16, 2009. Bautista subsequently telephoned Coaxum and advised him that he was not a partner in the business, did not know Richardson's whereabouts, and was also owed money. Coaxum stated that he then contacted the claimants who informed him that Bautista was a "partner" in the business, although Coaxum could not recall the specifics of those conversations. Following the conversations with the claimants, DOL sent another demand letter to Bautista who responded in writing that he was not an owner or partner of Rich Knowledge Institute.

Coaxum testified that he determined Bautista was an employer based on the statements of Sohail and Khurram Hameed that Bautista was responsible for payment and was an owner or partner in the business. A 50% civil penalty was imposed because of the amount of wages owed, the length of time the claimants worked without pay, and because Coaxum "felt 50% was an appropriate penalty."

Testimony of Yohanna Casado

Yohanna Casado testified that she was hired by Richardson in 2003 to work as a receptionist at the Rich Knowledge Institute. Casado's job duties included sometimes taking calls for Bautista who she believed was a partner in the business. Casado never spoke to Bautista, but believed he was partner because another secretary told her Bautista was Richardson's partner. Casado further testified that on one occasion, Bautista gave her a paycheck.

FINDINGS AND CONCLUSIONS OF LAW

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

The Petitioners have the burden to show that the Orders are invalid or unreasonable (Labor Law § 101, 103; 12 NYCRR 65.30).

"Employer" as used in Articles 6 and 19 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]; *see also* Labor Law § 651 [6]). "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 F Supp 2d 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]).

Bautista credibly testified that although he was involved in reviewing the resumes of applicants for computer teaching positions and in some cases conducted initial interviews, ultimate authority for hiring employees was with Richardson. Bautista likewise credibly testified that he had no involvement in determining the rate and method of payment of the Rich Knowledge Institute’s employees, and that he only supervised employee schedules and conditions of employment to the extent that he assigned teachers to classrooms and developed the curriculum that they used. We do not find that this rises to the level of control necessary to support DOL’s determination that Bautista was an “employer” under Article 6 of the Labor Law, and DOL has presented no evidence sufficient to rebut Bautista’s testimony. The claimant who testified at the hearing had very little interaction with Bautista and only listed him as a responsible party at the firm because somebody told her that Bautista was a partner. The other claimants did not testify and their hearsay statements absent more cannot form the basis for a finding that Bautista is individually liable for unpaid wages under the Labor Law. Accordingly, we find DOL’s determination that Bautista was the claimants’ employer during the time period covered by the order is unreasonable.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order to Comply with Article 6 of the Labor Law dated April 10, 2009, is annulled with respect to Roberto A. Bautista; and
2. The Petition of Roberto A. Bautista be, and the same hereby is, granted.



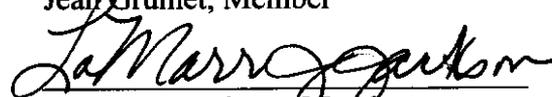
Anne P. Stevason, Chairman



J. Christopher Meagher, Member



Jean Grumet, Member



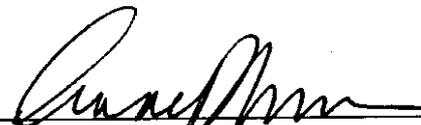
LaMarr J. Jackson, Member

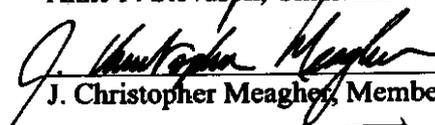
Jeffrey R. Cassidy, Member

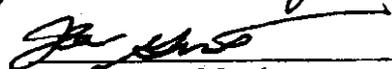
Dated and signed in the Office of
the Industrial Board of Appeals,
at New York, New York, on
September 22, 2010.

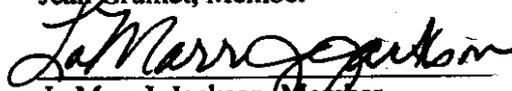
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J. Christopher Meagher, Member


Jean Grumet, Member


LaMarr J. Jackson, Member


Jeffrey R. Cassidy, Member

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