

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

ALAN CROWLEY AND TEKNEX NY, INC., :

Petitioners, :

To Review Under Section 101 of the Labor Law: :
Two Orders Under Article 6, and an Order Under :
Articles 6 and 19 of the Labor Law, all dated April 28, :
2009, :

DOCKET NO. PR 09-144

RESOLUTION OF DECISION

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :
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APPEARANCES

Alan Crowley, petitioner pro se, and for Teknex NY, Inc.

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

WITNESSES

Alan Crowley, for petitioners.

Fidel Sanchez, claimant, for respondent.

WHEREAS:

On June 1, 2009, Alan Crowley and Teknex NY, Inc. (Teknex) (Petitioners) filed a Petition for review 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 three Orders to Comply that the Commissioner of Labor (Commissioner, Respondent or DOL) issued against them on April 28, 2009. The first Order to Comply with Article 6 (Wage Order) finds that Petitioners failed to pay wages to three employees: Adan Olarte Garcia, Luis Orlando Quito and Jose Fidel Sanchez Cortesano for the period September 12, 2007 to December 28, 2008 and demands payment of a total of \$9,512.29 in wage underpayments (\$1,725.04 to Olarte,

\$2,080.00 to Quito and \$5,707.25 to Sanchez), interest at the rate of 16% calculated through the date of the order in the amount of \$1,281.80, and a 100% civil penalty of \$9,512.29 for a total amount due as of the order's date of \$20,306.09. The second Order Under Article 6 (Wage Supplements Order) finds that Petitioners failed to pay Quito \$120.00 in expenses for the period September 12, 2007 to April 14, 2008 and demands payment of \$120.00, interest at the rate of 16% calculated through the date of the order in the amount of \$18.36, and a 100% civil penalty of \$120.00 for a total amount due as of the order's date of \$258.36. The third Order under Articles 6 and 19 (Penalty Order) finds that the Petitioners failed to keep and/or furnish true and accurate payroll records for each employee for the period from on or about March 1, 2008 through March 31, 2008 in violation of Labor Law § 661 and 12 NYCRR § 142-2.6, and failed to maintain and preserve payroll records showing hours worked, gross wages, deductions and net wages for each employee in violation of Labor Law § 195.4. The Penalty Order demands payment of \$750.00 for each count for a total penalty of \$1,500.00.

The *pro se* Petition alleges that the individual employees are owed some money but not the amounts stated in the Orders. An Answer was filed by the Respondent on July 31, 2009.

Upon notice to the parties, a hearing was held on April 26, 2011 in White Plains, New York before Jean Grumet, Esq., Member of 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, to make statements relevant to the issues, and to make closing arguments.

I. SUMMARY OF EVIDENCE

At hearing, the parties stipulated that the Wage and Wage Supplements Orders correctly state the wages and wage supplements owed to Quito and Olarte, and that the only issue with regard to the claims of those two claimants was whether the penalties assessed by the DOL were proper. Petitioner also contests the amount due to Fidel Sanchez.

Petitioner Alan Crowley testified that Teknex was no longer in business and due to the fact that the full amount of the orders could not be paid, he was making an offer for settlement. Crowley also maintained that Sanchez is not owed the amount claimed in the order by Teknex. Crowley believes that the pictures presented by Sanchez showing work that he did was actually work performed by another company, Mega Electric, during a different time period.

When Respondents' counsel stated that he could not accept Petitioners' settlement offer, Crowley left the hearing room, prior to the end of the hearing.

Respondent called Fidel Sanchez as a witness. On January 16, 2009, Sanchez filed a claim with the DOL against Petitioner. Sanchez testified that Crowley hired him to work for Teknex, a construction contractor, as a general helper at a rate of \$11.00 per hour, on or

about February 2, 2008 and that his last day of work was September 1, 2009. Sanchez was paid in cash weekly, without ever being given a receipt. Beginning in August 2008, Sanchez began having a problem collecting his wages, and he started keeping a log of his daily work hours and what he was owed. Sanchez also took photographs of places he worked for Teknex. His claim for unpaid wages was based on the log he kept. After leaving Petitioners' employ because he was not paid, Sanchez was hired as a helper by Mega Electric, which had performed work for Crowley. None of the photographs taken by Sanchez and submitted into evidence by the DOL were of jobs he did while working for Mega Electric; all were of jobs on which he worked for Petitioners without being paid.

II. STANDARD OF REVIEW

In general, 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). If the Board finds that the "order, or any part thereof, is invalid or unreasonable it shall revoke, amend or modify the same" (Labor Law § 101(3)).

Pursuant to Rule 65.30 of the Board's Rules of Procedure and Practice (Rules) (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 were invalid or unreasonable.

III. FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to Board Rule 65.39 (12 NYCRR § 65.39). For the reasons stated below, we find that the Petitioner has not met his burden of proving that Fidel Sanchez was properly paid, and we affirmed the penalties imposed in all three of the Orders.

Wages due to Fidel Sanchez

Article 6 of the Labor Law requires employers to pay employees wages earned in accordance with the agreed terms of employment, not less frequently than semi-monthly, on regular pay days designated in advance (Labor Law § 191 [1] [d]). Article 19 requires employers to maintain payroll records and to keep those records available for inspection by the Commissioner at any reasonable time (Labor Law § 661). The Commissioner's regulations implementing Article 19, at 12 NYCRR § 142-2.6, provide that weekly payroll records must be maintained and preserved for six years and shall show, *inter alia*, the name and address; social security number; wage rate; number of hours worked daily and weekly; amount of gross wages; deductions from gross wages; allowances if any claimed as part of minimum wages; and net wages paid for each employee. Article 6 of the Labor Law also required employers to establish, maintain and preserve payroll records showing hours

worked, gross wages, deductions and net wages for each employee (Labor Law § 195 [4]).

An employer's failure to keep adequate records does not bar employees from making wage complaints. Where employee complaints demonstrate a violation of the Labor Law, DOL must credit the complainant'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. (*See* Labor Law § 196-a; *Angello v. National Finance Corp.*, 1 AD3d 850 [3d Dept. 2003].)

In the present case, Petitioners stipulated that the Wage Order and Wage Supplements Order correctly stated amounts due to two of the three Claimants. With respect to the third, Sanchez, Petitioners failed to supply any records concerning Sanchez' hours or what he was paid, and did not even dispute the orders beyond stating in general terms that they were exaggerated. In these circumstances, the DOL was entitled and required to calculate 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" (*Mid-Hudson Pam Corp.*, 156 AD2d 818, 821 [3d Dept 1989]). Petitioners did not meet their burden and we therefore find that the Wage Order and Wage Supplements Order were valid and reasonable in their entirety.

Civil Penalties

Labor Law § 218 provides that in assessing the amount of a penalty, the commissioner "shall give due consideration" to the following factors: (1) the size of the employer's business; (2) the good faith of the employer; (3) the gravity of the violation; (4) the history of previous violations; and (5) in the case of violations involving wages, benefits or supplements, the failure to comply with recordkeeping or other non-wage requirements. The Board finds that the considerations and computations that the Commissioner was required to make in connection with the imposition of the civil penalty amounts are reasonable in all respects.

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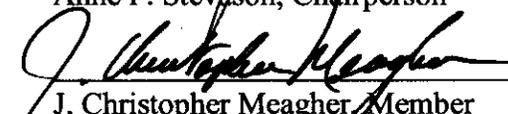
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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Orders are affirmed;
2. The Petition is denied.



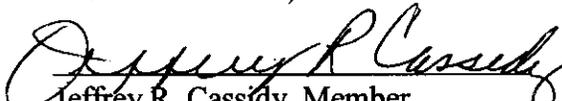
Anne P. Stevenson, Chairperson



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 New York, New York, on
January 30, 2012.

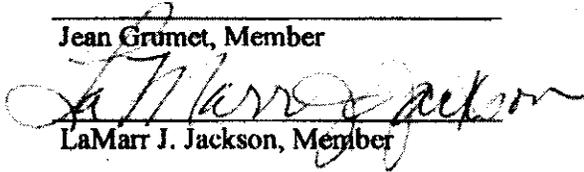
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Orders are affirmed;
2. The Petition is denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member



LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
January 30, 2012.