STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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| In the Matter of the Petition of: | : | |
| KNIGHT MARKETING CORPORATION OF NEW YORK STATE (T/A KNIGHT MARKETING CORP. OF NEW YORK). | : | |
| Petitioner, | : | DOCKET NO. PR 09-200 |
| To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the New York State Labor Law, dated June 9, 2009, | : | RESOLUTION OF DECISION |
| - against - | : | |
| THE COMMISSIONER OF LABOR, | : | |
| Respondent. | : | |

**APPEARANCES**

Stan Peters, President of Knight Marketing, *pro se* for Petitioner. Also present: Tina L. McCormack, Director of Operations.

Maria L. Colavito, Counsel, NYS Department of Labor, Larissa C. Bates, Esq., of Counsel, for Respondent.

**WITNESSES**

Stan Peters, for Petitioner. Labor Standards Investigator Marie-Elena Fazzio, for Respondent.

**WHEREAS:**

The petition for review in this matter was filed with the Industrial Board of Appeals (Board) on July 10, 2009 by Petitioner Knight Marketing Corporation of New York State (T/A Knight Marketing Corp. of New York) (Petitioner), and seeks review of an order that the Commissioner of Labor (Commissioner or Respondent) issued on June 9, 2009 against Allen S. Peters and Petitioner. The order is to comply with Article 6 of the Labor Law and finds that the Petitioner failed to pay benefits or wage supplements in the amount of $855.00 to Rosemarie Wieworka (Claimant), for the period October 22, 2007 to April 22, 2008. The order further finds interest due at the rate of 16%, calculated through the date

of the Order in the amount of $155.17; and a civil penalty assessed in the amount of $855.00, for a total amount due under the Order, as of that order's date, of $1,865.17.

The Petition alleges that Claimant accumulated and used three flex days at the time of her layoff in March 2008 but "did not complete the year of 2008, therefore did not accumulate the vacation time she is claiming." The Petitioner also challenged the interest and the civil penalty. Respondent filed an answer on September 30, 2009. Upon notice to the parties, a hearing was held on January 18, 2011 in Old Westbury, 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

*Testimony of Stan Peters*

In 1990, Stan Peters (Peters) founded Knight Marketing, a marketing company which has 24 employees. Peters hired Claimant for an entry- level job in November 2007. In January of 2008, Peters gave Claimant a copy of Petitioner's 2008 "Holiday and Vacation Schedule" (Leave Policy), which set forth a new "flex day" policy, and states in full:

> "This year we are starting a new vacation schedule. You have a total of 12 Flex Days. These days include but are not limited to, sick, vacation, personal, family emergencies etc.
>
> "Please use your days wisely, you will not be paid for anything exceeding these 12 days. Exceeding 12 Days will result in an employee review. Poor attendance can result in termination.
>
> "The following rules apply:
>
> - Vacations must be approved in advance....you must give at least three weeks notice for vacations, Days off must be reviewed by management.
> - Vacations cannot exceed 5 Consecutive Days.
> - With the exception of sickness/family emergency, all days must be approved by management
> - Days before and after holidays are on a first come first serve basis, if you are intending to take off during this time, you must notify me in advance!
> - Flex Days do not roll over!
>
> *****Employee Bonus...you will receive one full days pay per Flex day unused!!*****"

All Knight Marketing employees received a copy of this policy "so they could plan their vacations accordingly... And we go over flex days so people can take off for whatever type of observance and not be penalized in any way so they know what they're getting." Claimant was paid for three days she had used before she was laid off in March 2008. She was not entitled to nine additional flex days because she did not work long enough for them to accrue. Peters testified that there was "an assumption of accrual, which I did not write into the rules."

*Testimony of Marie-Elena Fazzio*

DOL Labor Standards Investigator (LSI) Marie-Elena Fazzio (Fazzio) testified that the DOL received a Claim for Unpaid Wage Supplements, dated April 11, 2008, in which Claimant stated that she was discharged by Knight Marketing on March 21, 2008 because she was no longer needed due to a new computer system, and claimed that she was owed $855.00 in supplemental wages based on the Petitioner's leave policy, which she attached to her claim. The DOL found merit in the claim because the policy did not indicate how flex time was accrued; "[i]t just says that you get 12 days." Nor did the policy state that unused flex days were forfeited at the end of an employee's employment. The policy only stated that flex days do not roll over from one year to the next.

On April 25, 2008, the DOL wrote to Knight Marketing at its street address in Maspeth, NY, the address given in the claim form, requesting that Knight Marketing send $855.00 for Claimant's claim, or "a full statement from you giving your reasons" why it was not payable. No response was received, nor was the letter returned to the DOL.

On March 18, 2009 the DOL again wrote to Knight Marketing, this time to Peters' attention at the street address and also a post office box in Maspeth, NY, enclosing a copy of the earlier letter and stating that because DOL received no response to the earlier letter, the DOL had no choice but to take the position that the $855.00 was due and owing, and as a result, the matter had been referred for issuance of an Order to Comply which included the imposition of civil penalties because payment was not remitted. The letter continued:

> "Once your Order is signed and processed we will be unable to reverse the applied penalties and interest. We have assigned the names of Allen S. Peters, Stan Peters and Tina McCormick as the agents of your corporation responsible for your failure to pay Ms. Wieworka's wage supplements because no other information is available.
>
> "In order for your company and its agents to avoid penalties and interest you must remit payment of $855.00 no later than April 3, 2009."

This time, too, no response was received, nor was the letter returned to the DOL.

On March 18, 2009, DOL Senior LSI Jeremy Kuttruff prepared an Issuance of Order to Comply Cover Sheet and accompanying documents, recommending that Knight Marketing be assessed a 100% penalty. With respect to "Good Faith of Employer," Kuttruff checked a box on the form for "Not generally cooperative," and explained: "Employer failed to respond to collection letter and 2nd notification. Employer failed to respond to letter announcing imminent OTC. Employer failed to send records, failed to send payment."

LSI Fazzio testified that the highest civil penalty that can be issued in a non-payment of wage supplements case is 200%, but 100% was the appropriate penalty in this case. On June 9, 2009 the DOL issued the Order, which was sent to Knight Marketing at its street address in Maspeth, NY.

*Further Testimony of Peters*

Peters testified on rebuttal that the first time Petitioner was notified of Wieworka's claim was June 9th or 10th, 2009, when he received the Order to Comply addressed to the street address in Maspeth, NY. Peters stated that the earlier letters were never delivered because Petitioner's "legal address" is a post office box: "We don't have a mailman that actually delivers mail to the building. We have to go pick up our mail in town. So we have a post office box as our official address." Peters stated that he never received the DOL correspondence which was mistakenly sent to the street address.

## 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 Order was invalid or unreasonable.

## III. FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to the provisions of Board Rule 65.39 (12 NYCRR 65.39). For the following reasons, we affirm the Commissioner's Order and find that the Petitioner failed to meet its burden of proving that its 2008 Holiday and Vacation Schedule required employees to work a full twelve months in

order to accrue twelve flex days.

There is no legal requirement in New York for an employer to provide flex pay, vacation pay, holiday pay or other forms of leave to employees. However, once an employer establishes a paid leave policy for its employees, Labor Law § 198-c requires such employer to provide this benefit in accordance with the terms of whatever leave policy it has established. *(See, e.g. Gennes v Yellow Book of New York, Inc.*, 23 AD3d 520, 521 [2005]). Labor Law § 198-c(1) requires "any employer who is a party to an agreement to pay or provide benefits or wage supplements to employees...to provide such benefits or furnish such wage supplements within thirty days after such payments are required to be made." Under Labor Law § 198-c(2), benefits or wage supplements include vacation and holiday 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."

The issue in this case is whether the DOL validly and reasonably concluded that Petitioner's Leave Policy entitled Claimant, on termination of her employment in March 2008, to be paid for nine of the "total of 12 Flex Days" which she had not already used; or whether, as Peters argued, the Leave Policy included "an assumption of accrual, which I did not write into the rules," under which the 12 days were to be earned *pro rata* over the year so that in three months' time, Claimant had only "accrued 3 days of the 12 days vacation."

As Peters noted at the hearing, the Board ruled in *Matter of Marc E. Hochlerin*, PR 08-055 [Mar. 25, 2009], that "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 the present case Petitioner did not, and could not, argue that its Leave Policy specified that employees forfeit accrued flex pay upon termination. Petitioner argues, instead, that there was an implicit understanding that the 12 Flex Days which its Leave Policy made available to employees for whatever use, including but not limited to "sick, vacation, personal, family emergencies etc.," were not immediately available but were to be earned and accrued *pro rata* through the year.[1]

The DOL validly and reasonably rejected this interpretation. Many vacation policies state that vacation is earned *pro rata* over time at a stated rate. The Board enforces the policy as stated in such cases, including, for example, *In the Matter of Joel D. Fairbank and 2nd Nature, LLC*, Pr 09-052 [April 27, 2011] ("According to the posted vacation policy, monthly accrued vacation time was earned by dividing the yearly amount of vacation granted by 12 months"); *Matter of Mark E. Hochlerin*, PR 08-055 [Mar. 25, 2009] ("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");

[1] Peters acknowledged that he "was probably remiss in not writing the accrual language into this vacation and flex day schedule."

and *In the Matter of The Center for Financial Planning, Inc.*, PR 06-059 [Jan. 28, 2008] ("Vacation days are earned throughout the year at 3.077 hours of vacation time per two week pay period [3.077 x 26 pay periods = 80hrs]"). But policies that deem all vacation days to be earned and available at the commencement of the year are also legally enforceable. *See, e.g., Matter of City of Middletown* v. *City of Middletown PBA*, 30 AD 3d 597 [2d Dept. 2006] (City could not unilaterally change vacation policy under which "officers... accrue their annual allotment of vacation days on January 1st").

In the present case, it was reasonable to read the Leave Policy as *not* requiring that employees earn Flex Days *pro rata* over a full year's period. The policy (a) stated that "[y]ou have a total of 12 Flex Days," without limiting that statement based on particular circumstances such as how many days employees had accrued; (b) specified that these days should be used for purposes including "sick,... family emergencies etc.," which by their nature do not accrue according to a regular schedule; (c) stated that "you will not be paid for anything exceeding these 12 days," implying that some workers would likely use them up early in the year; (d) stated that "Flex Days do not roll over," though days earned month by month would logically not be forfeited at year's end; and (e) involved not only vacation, but "Flex Days" available for purposes "not limited to, sick, vacation, personal, family emergencies etc." While a Leave Policy otherwise like Petitioner's could provide for *pro rata* accrual, as vacation policies in the *Fairbank*, *Hochlerin* and *Center for Financial Planning* cases did, such a provision should be clearly stated, and there was no statement or other indication that the leave accrued as the year progressed in this Leave Policy.

This conclusion accords with the general legal rule that where the terms of a contract are unambiguous, the language must be enforced as written. *Guasteferro v. Family Health Network of Central New York*, Inc., 203 AD2d 905 [4th Dept. 1994]. While the Leave Policy was not ambiguous, we note that any ambiguities in a contract "must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language." *Jacobson v. Sassower*, 66 NY2d 991, 993 [1985].

Peters testified that the reason for distributing the Leave Policy was so that employees could plan accordingly and "so they know what they're getting." An obvious purpose of Labor Law § 195(5), implemented by the Board's rulings in *Marc E. Hochlerin* and *Center for Financial Planning*, is to make sure that employees understand their rights and are not suddenly surprised to learn that rights do not exist just when they are needed most, including on termination from employment. In this respect, the present case is no different, and we find that just as an employee must be paid for accrued vacation unless the employer has, through a written policy or agreement, specified that accrued vacation pay is forfeited, a terminated employee is entitled to all promised flex pay unless the employer has, through a written policy or agreement, specified that such flex pay must be accrued *pro rata* over a specified period of time. The Commissioner validly and reasonably determined that Petitioners' Leave Policy did not do that.

## IV. CIVIL PENALTIES

The Order additionally assessed a 100% civil penalty in the amount of $855.00. 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 the Order were followed and that the Order is valid and reasonable in all respects. According to L.S.I. Fazio, the 100% penalty was imposed because of Petitioner's lack of cooperation in failing to respond to the DOL's correspondence. Peters claimed that Petitioner's "legal address" was a Post Office Box, and mail sent to Petitioner's street address was not delivered. Yet the Order, which Peters acknowledges receiving, was sent only to the Petitioner's street address as was the first collection letter Peters denied receiving. Moreover, Petitioner did not respond to the second collection letter addressed to the Post Office Box that Peters testified was the Petitioner's "legal address." Under these circumstances, we find that the Petitioner did not meet its burden of proof and we find that the 100% civil penalty was reasonable.

## V. 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 Wage Order is affirmed;

2. The Petition is otherwise denied.

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 New York, New York, on
September 9, 2011.

## IV. CIVIL PENALTIES

The Order additionally assessed a 100% civil penalty in the amount of $855.00. 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 the Order were followed and that the Order is valid and reasonable in all respects. According to L.S.I. Fazio, the 100% penalty was imposed because of Petitioner's lack of cooperation in failing to respond to the DOL's correspondence. Peters claimed that Petitioner's "legal address" was a Post Office Box, and mail sent to Petitioner's street address was not delivered. Yet the Order, which Peters acknowledges receiving, was sent only to the Petitioner's street address as was the first collection letter Peters denied receiving. Moreover, Petitioner did not respond to the second collection letter addressed to the Post Office Box that Peters testified was the Petitioner's "legal address." Under these circumstances, we find that the Petitioner did not meet its burden of proof and we find that the 100% civil penalty was reasonable.

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Dated and signed in the Office
of the Industrial Board of Appeals
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