STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
PETER DURKIN AND R&R SERVICES, INC.,	
Petitioners,	
To Review Under Section 101 of the Labor Law: an Order to Comply with Article 6 and an Order under Article 19 of the Labor Law, both dated September 4, 2009,	DOCKET NO. PR 09-313
- against -	RESOLUTION OF DECISION
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Peter Durkin, petitioner pro se, and for R & R Services, Inc.

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

WITNESSES

Peter Durkin, for petitioners.

Harold Struble, Claimant; Maura McCann, Supervising Labor Standards Investigator; and Margaret Struble, for respondent.

WHEREAS:

On November 3, 2009, Peter Durkin (Durkin) and R&R Services, Inc. (T/A Orange Heating & Air Conditioning A/K/A Orange Heating and Central Avenue) (Orange) (together, 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 two Orders to Comply that the Commissioner of Labor (Commissioner, Respondent or DOL) issued

with an "Amended Notice" on September 4, 2009. The first Order under Article 6 (Wage Supplement Order) finds that Petitioners failed to pay Harold J. Struble Sr. (Claimant) vacation for the period from August 1, 2004 to August 1, 2006, and demands payment of $5,544.00 in vacation pay, interest at the rate of 16%, calculated through the date of the Order in the amount of $2,746.18; and a 100% civil penalty in the amount of $5,544.00 for a total amount due as of the Order's date of $13,834.18. The second Order under Article 19 (Penalty Order) finds that Petitioners failed to keep and/or furnish true and accurate payroll records for each employee for the period from January 8, 2004 through January 8, 2006, and demands payment of $500.00.

The Petition alleged that Orange closed "in or about 2006;" that Durkin never received notification of a request for information as outlined in the Orders; that correspondence was sent by the DOL to Petitioners at 65 E Main Street, Middletown, NY 10940-5018 which was no longer Petitioners' address and was never forwarded to Durkin; and that Durkin first learned of the Amended Notice "upon its receipt at his current place of employment on or about September 10, 2009." On November 29, 2010 Petitioners filed an Amended Petition which added allegations that Durkin and Claimant were employed by the same employer from 2007 through 2010 yet Claimant neither requested back wages from Durkin nor notified him of a complaint or investigation; and that after learning of the Orders Durkin requested documentation from the DOL numerous times but did not receive it. The Petition requests that the Orders be voided or at a minimum that the civil penalty be eliminated.

An Answer to the Petition was filed on December 28, 2009.

Upon notice to the parties, a hearing was held on March 24, 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

Testimony of Peter Durkin

Orange was a heating and air conditioning company formerly partly owned by Durkin's father. Durkin worked there starting in 1977 and later became an owner and president. Claimant Struble worked for Orange both when it was owned by Durkin's father and when it was owned by Durkin.

Orange's vacation policy was to provide employees with up to three weeks' annual vacation, based on longevity. The office manager, Lindsay Schneider, kept track of employee vacation time; Durkin does not know what process she used.

Struble "had a regular vacation schedule every year he ever worked for [Petitioners]" including one week off in August, one week at Christmas, and the day after Thanksgiving. A written company policy stated that employees with unused vacation time at year's end

received a cash payment and that vacation time did not carry over from year to year. This policy was part of an employee handbook, which Durkin testified he no longer had because he kept records in his office and was denied access after the building changed hands.

Durkin closed Orange at the end of 2006 and became an employee of Apollo, which, in an effort to retain Orange's customers, paid Durkin a signing bonus. Durkin testified that, "shortly after that we moved to the location on North Street."[1] At Durkin's request, Apollo also hired Struble. Durkin started with Apollo sometime in January 2007 and Struble followed "shortly after." Durkin did not recall any discussion with Struble about the transition to Apollo.

Orange had maintained a corporate post office box whose number Durkin did not recall and which he stopped using when he closed Orange. Orange also received mail at its street address; after closing, Durkin did not "go on a daily basis to pick up mail" and did not instruct the post office to forward mail. According to Durkin, "all corporate, anything that has to do with Orange Heating was abandoned after the building closed." Although both men worked at Apollo and Struble often visited Durkin's house, Struble never made Durkin aware of his DOL claim. Durkin's first knowledge of the DOL case was when he received the Orders to Comply in September 2009.

Testimony of Claimant, Harold Struble

Claimant was hired by Orange, then owned by Durkin's father and a partner, in 1970 and worked as a furnace cleaner and later as an installer. When hired, Claimant was told both orally and in writing that he would have one week's vacation after one year and two week's vacation after two years; after ten years, he was given a third week of vacation. Claimant could not recall whether the third week of vacation was forfeited at the end of the year, and did not have a written copy of the vacation policy. Although there was a company handbook, Struble never received a copy.

Claimant continued to work for Petitioners as an installer until December 14, 2006 when Durkin informed him that he no longer worked for Petitioners, he worked for another company. Other Orange employees were still working at that time; Claimant did not know whether Orange had closed.

Claimant's final pay rate with Petitioners, confirmed by his pay stub for the week ending December 13, 2006, was $21.00 per hour. His pay stub for the week ending October 4, 2006, which shows an $18.00 per hour rate, includes a note written by Durkin[2] stating "starting 10-5 [$] 21 per hour 4 weeks vacation." Claimant testified that the pay raise and increase to four weeks' vacation time were agreed to in a conversation with Durkin around the time of the October 4, 2006 stub, and that his understanding was that the vacation could be taken when Durkin permitted and could be "rolled over" from year to year. Claimant

[1] Durkin testified that "I closed at 65 East Main Street." However, the Petition alleges that Durkin learned of the Orders when he received the DOL's Amended Notice, dated September 4, 2009 and addressed to 65 E. Main Street, "at his current place of employment on or about September 10, 2009;" the Amended Petition states that he received the Amended Notice "at his place of employment on or about September 10, 2009."

[2] Claimant testified that the writing was Durkin's. Durkin testified that he had no specific recollection and usually signed or initialed such writings, but it "looks like my handwriting."

agreed with Durkin that he usually took vacation for a week in August, the week between Christmas and New Year's, and the day after Thanksgiving.

On May 31, 2007 Claimant, assisted by his wife Margaret Struble and office manager, Lindsay Schneider, filed a claim with the DOL stating that Petitioners owed him vacation pay in the amount of $5,544.00. The claim states that Claimant demanded payment of Durkin on April 9, 2007 and Durkin "did not accept certified letter sent to him." Claimant did not know how the $5,544.00 figure was calculated; Schneider performed the calculation, he believed based on vacation records. The claim form, which Schneider helped him to fill out, states that the employer's policy was to give three weeks' vacation after ten years and that "time could roll over from year to year." The statement concerning vacation time rolling over was in Schneider's handwriting.[3]

Testimony of Maura McCann

Maura McCann, a Supervising Labor Standards Investigator for the DOL, testified that Claimant's claim form listed Orange's address as 65 East Main Street and Durkin's as P.O. Box 2204. The DOL wrote to Petitioners at Orange's street address on November 6, 2007; the post office returned that letter as undeliverable on November 17, 2007. On December 18, 2007 the DOL again wrote to Petitioners, this time, since mail to the street address had been returned as undeliverable, at the P.O. Box 2204 address. No response was received, nor was any received to a February 20, 2008 letter which the DOL sent to the same address stating that having received no response, the DOL would proceed to issue Orders with respect to Claimant's vacation pay and the failure to produce relevant records.

On April 9, 2008, McCann had the DOL perform an Accurint search for addresses for Peter Durkin, Orange Heating & Central Air and R&R Services, Inc., which returned only the two addresses to which the DOL had already sent correspondence. Based on the fact that Petitioners had been in business a long time and had not responded to the DOL's inquiries, she recommended ordering a 100 percent civil penalty, which she testified is "mid range" between zero and the 200 percent penalty prescribed by Labor Law § 218 for willful and egregious violations. McCann's supervisor accepted her recommendation.

In September 2008 the DOL again wrote to Petitioners to inform them of the decision to issue Orders to Comply, but in the course of September 2008, both this letter and the others previously sent to the post office box were all returned to the DOL by the post office as "Not Deliverable as Addressed." In McCann's experience, the post office eventually closes boxes whose owners do not pick up mail, and at that time returns all accumulated mail. She testified that since the post office box was closed, the DOL decided to reissue the order to another address. On September 4, 2009 it therefore sent an "Amended Notice" to Petitioners, addressed to "Peter Durkin and R&R Services Inc. (T/A Orange Heating & Air Conditioning A/K/A Orange Heating & Central Ave" at 65 E Main Street, Middletown, New York, enclosing the Orders to Comply here at issue.[4]

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[3] The DOL introduced in evidence two versions of the claim form: the first draft, which Lindsay Schneider helped draft, and the claim form that was filed with the DOL.

[4] As previously noted, the Petition and Amended Petition allege that Durkin received this Amended Notice addressed to 65 E. Main Street at his place of employment.

On cross-examination, McCann testified that she did not recall speaking to Claimant to try to locate Durkin and did not use various other methods such as internet and record searches, looking on Facebook or in the telephone book. Since mail was not returned until September 2008, she concluded she had reached Durkin.

Testimony of Margaret Struble

Margaret Struble, Claimant's wife, testified that she and Petitioners' office manager, Lindsay Schneider, helped Claimant prepare his DOL claim. Schneider wrote "vacation time could roll over from year to year" on the first draft of the claim. DOL moved into evidence a post-it given to Claimant by Schneider, on which Schneider wrote: "3 days remaining from previous year and received 33 days vac/sick on anniversary and didn't use."

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 following reasons, we affirm the Commissioner's Supplemental Wage Order and find that the Petitioners failed to meet their burden of proving that Claimant was not entitled to vacation pay. We also affirm the Order under Article 19 for failure to maintain payroll records.

There is no legal requirement in New York for an employer to provide 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 (*Gennes v Yellow Book of New York, Inc.*, 23 AD3d 520, 521 [2005]; *Matter of Glenville Gage Co., v State Indus. Bd of Appeals,* 52 NY2d 777 [1980], *affg* 70 AD2d 283 [3rd Dept 1979]; *Matter of the Petition of Center for Financial Planning, Inc.,* PR 06-059 [January 28, 2008]; *Matter of Nathan Godfrey,* PR 09-024 [January 27, 2010]; *Matter of Joel D. Fairbank and 2nd Nature, LLC*, PR 09-052 [April 27, 2011]; *Matter of Knight Marketing Corporation of New York*, PR 09-200 [September 9, 2011]).

Labor Law § 195 (5) requires an employer to "notify his employees in writing or by publicly posting the employer's policy on ...vacation," and Labor Law § 198-c requires "any employer who is party to an agreement to pay or provide benefits . . . within thirty days after such payments are required to be made." Forfeiture of vacation pay upon termination must be specified in the employer's vacation policy or in an agreement with the employee *(Matter of Petition of Marc E. Hochlerin and Ace Audio Video, Inc. [T/A Ace Audio Visual Co., and Ace Communication]* PR 08-055 [March 25, 2009]; *Matter of Joel D. Fairbank and 2nd Nature, LLC,* PR 09-052 [April 27, 2011]), and forfeiture provisions must be explicit (*Fin. Planning, Inc.*; *see also, Yellow Book*, 23 AD3d at 522 [employees were not entitled to vacation pay upon termination under a policy that expressly stated "[n]o vacation time is accrued or payable if the [employee] is not employed as of July 1 following the calculation period"]; *Paroli v Dutchess County*, 292 AD2d 513 [2nd Dept 2002] [an employee was entitled to vacation pay upon termination as the employer's benefit plan contained no qualifying language entitling employees to the benefit only if they were in "good standing"]).

In the present case, Durkin acknowledged that Claimant was owed some vacation pay, but argued that the entitlement was not as great as the DOL claimed because employees received no more than three weeks' annual vacation and a written vacation policy prevented vacation days from being carried over from year to year. Petitioners provided no credible evidence that such a written policy existed during the relevant period or that Claimant was aware of such a policy. Durkin testified he did not know how Petitioners kept track of vacation time, a matter left to Petitioners' office manager Lindsay Schneider. By contrast, Respondent's evidence included a pay stub on which, it was undisputed, Durkin agreed to a fourth week of vacation for Claimant, and testimony from Claimant and his wife that it was Schneider herself who calculated the amount of Claimant's vacation claim.

We also affirm the Penalty Order for failure to maintain records. Article 19 of the Labor Law requires employers to maintain records, to keep those records available for inspection by the Commissioner at any reasonable time, and to furnish them to the Commissioner on demand (Labor Law § 661). Pursuant to 12 NYCRR § 142-2.6, employee records, including records of weekly hours worked and payments to employees, must be maintained and preserved for six years. Petitioners here did not maintain employee records as required by the Labor Law.

Petitioners argued that no penalty should be imposed in either of the two Orders because Petitioners allegedly first learned of the DOL investigation when Durkin received the "Amended Notice" sent to 64 E. Main Street in September 2009. It is undisputed, however, that the DOL also repeatedly wrote to Petitioners earlier both at 65 E. Main Street and at Durkin's post office box, and Petitioners submitted no evidence that they ever attempted to collect mail, have mail forwarded or notify the DOL or anyone else of a new address. Although Durkin testified that he closed at 65 E. Main Street in or around December 2006 and thereafter did not check mail, he acknowledged receiving the "Amended Notice" there, and his testimony was somewhat equivocal as to whether Apollo, his new employer, continued to operate there (as well as at a different location); moreover, the Petition itself describes 65 E. Main Street as Durkin's place of employment in September 2009.

In any event, the Board has previously found that when petitioners were properly served at both their business address and the owner's personal address, with no evidence that service was improper or not calculated to notify them, a mere statement of non-receipt is insufficient to overcome the presumption of proper service and receipt (*Matter of Jeffrey H. Astor and Jeffco Plumbing, Inc.*, PR 08-056 [Mar. 24, 2010] citing *News Syndicate Co. v. Gatti Paper Stock Corp.*, 256 NY 211 [1931]; *National Ins. Co. v. Murray*, 46 NY2d 828 [1978]). While Petitioners argued that the DOL could have done more to track them down, they did not establish that the DOL's efforts were invalid or unreasonable. LSI McCann's testimony established a reasonable basis for imposition of a penalty in accordance with the statutory factors.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Supplement Order is affirmed;

2. The Penalty Order is affirmed;

3. 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 in the Office
of the Industrial Board of Appeals
at New York, New York, on
January 30, 2012.

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Jeffrey R. Cassidy, Member

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