STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
STEVEN MARCHIONDA AND INTERNATIONAL GROUP, LLC,	
Petitioners,	
	DOCKET NO. PR 10-034
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6, dated January 8, 2010,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Handelman, Witkowicz & Levitsky (Steven M. Witkowicz of counsel), for Petitioners.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Larissa C. Bates of counsel), for Respondent.

WITNESSES

Steven C. Marchionda, for Petitioners.

Lydia S. Pidlisny, Claimant; and Mary Coleman, Senior Labor Standards Investigator, for Respondent.

WHEREAS:

On February 8, 2010, Petitioners Steven Marchionda and International Group, LLC filed a Petition 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 an Order to Comply with Article 6 of the Labor Law (Order) that the Commissioner of Labor (Commissioner) issued against them on January 8, 2010.

The Order finds that the Petitioners failed to pay vacation pay to the Claimant, a former employee, in violation of Article 6 of the Labor Law. The Order demands payment of $779.62 in unpaid wage supplements for the period from January 10, 2008 to January 10, 2009, interest at the rate of 16% calculated to the date of the Order in the amount of $93.30 and a 100% civil penalty in the amount of $779.62, for a total amount due of $1652.54.

The Petition alleges that the Order is invalid and unreasonable because the claimant was not owed any vacation time because during the course of her employment she had taken more vacation time than she was entitled to. The Petitioners claimed that the company vacation policy granted an employee ten days of vacation as of the employee's anniversary date of hire after one year of continuous employment. The Petition stated that at the time of the Claimant's departure from the company, on or about April 10, 2009, she had "taken" over 60 days of vacation, despite having only earned 40.

Upon notice to the parties, the Board held a hearing in Rochester, New York on July 13, 2011, before Board Member LaMarr J. Jackson, Esq., the designated Hearing Officer in this case. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and raise relevant arguments. The Claimant and the Petitioner were both present and each testified at the hearing.

SUMMARY OF EVIDENCE

Petitioner Steven Marchionda (Marchionda) is the sole member of International Group, LLC (IG), a limited liability company located in Penn Yan, New York. IG is in the business of managing and operating private jet airplanes for charter. Marchionda is the President of IG and during the relevant time period the company had four employees. The Claimant, Lydia Pidlisny (Claimant or Pidlisny), was hired by IG as a Receptionist and Administrative Assistant, and her starting or anniversary date was January 10, 2005. The offer letter characterized her job as follows: "This is a full time position consisting of a forty hour work week. The schedule will be 8 AM to 5 PM with an hour off for lunch." The offer letter also noted: "You will be entitled to a two week vacation after having completed a full year of service."

The Claimant testified that at the time she was hired she informed her employer that she had a planned family reunion during July 2005, and that she wished to be able to take off three days to attend. She stated that she "was told I could use time that I earned in 2005 for that vacation in July." After being on the job a couple of months, Pidlisny asked her supervisors (Marchionda and Willie Taaffe) if she and another employee might be able to work more flexible hours during the summer months. This was not well received by Marchionda, who testified that he had an on-going issue with the Claimant and her efforts to have "flex-time" with respect to her work schedule.

In September 2005, Pidlisny asked to be allowed to take three days off to attend a friend's wedding and a concert in Toronto, Canada (Friday, September 23, and Monday and Tuesday September 26 and 27, 2005). She stated in the email requesting the time off that: "I've already begun to make up time to make sure all three days are made up before I am out. Please let me know if any of this is going to be a problem." Marchionda approved the time off.

Thus, Pidlisny began her employment at IG taking vacation time before she had accrued the benefit, taking time off (the family reunion and the time off in September) and making up the time by working extra time. The pattern was established that Pidlisny would take time off for

sick days or to take care of personal business and she would make up the time by working extra hours beyond her forty hour work week during the course of a month[1].

Marchionda testified that IG had a one page "Vacation Policy" dated July 1, 2004, that applied throughout the period that Pidlisny worked for the company, and that there was no specific policy with respect to sick time, bereavement time or personal time. He stated that any such time taken off as paid time would come under the employee's earned vacation time benefit. Marchionda stated that during the period of her employment Pidlisny earned 40 hours of vacation time and took 60 to 63 hours.

Pidlisny's understanding of the vacation policy was that she earned two weeks off after each year of employment; "and anything over and above, for example, sick time or personal time that was needed, would be take it as you need it and make it up."

Pidlisny was laid off in April 2009, and her last day at work was April 10, 2009. At the time of her termination, the Claimant believed that she was entitled to be paid for the ten days of vacation that she had earned as of January 10, 2009, under the company's vacation policy. She received a partial payment of $238.22 on April 25, 2009, and her claim with the Department of Labor (DOL) was for $779.62 in unpaid vacation time. The Petitioner took the position during the DOL investigation that Pidlisny had taken a total of 14.75 paid days off in 2008, which was 4.75 days in excess of the ten days that she had earned for that period of time and that the Claimant's efforts to "make-up" time off for illness or personal business was ineffective and unacceptable. However, Petitioner's own time records show a consistent pattern of the Claimant working extra time in excess of eight hours per day to make up for time taken off. In addition, the records separately label vacation time as "V", sick time as "S" and holiday time as "H."

The Claimant testified that she had always worked extra time to make-up for sick days or days when she had to leave early to take care of personal business. Pidlisny believed that she made up any time that she took off in excess of her vacation entitlement that was ten days each year after January 10, 2006. She testified that when she first started work she asked Marchionda about the company's policy regarding time off for illness or personal business. Her testimony was: "Generally I was told that it was a loose policy, that you could take the time as you needed it, so long as it was made up."

While not providing these records to the DOL during the investigation, the Petitioner introduced monthly calendars into evidence at the hearing. These calendars were objected to by the Respondent's counsel as incomplete documents, since they were compilations of time records and not the underlying records. The records were accepted into evidence as business records but the Hearing Officer noted that they might be accorded less weight given the lack of the underlying documentation and the Petitioner's failure to produce these documents during the investigation and during the course of the proceedings before the Board until the day of the hearing.

The format of these monthly calendars changed in 2008, when they reflected daily time records that noted times in and out to the minute. An examination of these calendars shows a consistent pattern of the Claimant working more than the required eight hours per day.

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[1] Whether the Claimant is entitled to an overtime premium for "make up" hours worked over 40 in a week is not an issue in this case.

This evidence is consistent with the Claimant's testimony that she had routinely worked to make-up any time taken as sick time or for personal business throughout her time with the company and did not just rely on her vacation days. While the Petitioner testified and submitted correspondence indicating that he did not appreciate the Claimant's practice of making up time, he did not forbid the practice and it continued throughout the four years that the Claimant worked for the company.

While the Petitioner testified that he did not appreciate the time taken off by Pidlisny, and that making up time in "...15 minute bits and pieces early in the morning..." was unacceptable and he implied that she was manipulating her time records; he presented no evidence to prove any falsification of any time records or that demonstrated that the Claimant was ever told to stop working extra time to make up for sick days or personal time off.

STANDARD OF REVIEW AND BURDEN OF PROOF

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 [1]). Pursuant to the Board's Rules of Procedure and Practice 65.30 [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 Petitioner to prove that the Order under review is not valid or reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rule 65.39 (12 NYCRR § 65.39). For the following reasons, we affirm the Wage Supplements Order and find that it was not invalid or unreasonable for the Commissioner to determine that the Employer failed to pay Claimant earned vacation pay in accordance with its policy.

a. The Petitioner Failed to Maintain Required Payroll Records.

Labor Law § 195[4] states that every employer must "establish, maintain and preserve for not less than three years payroll records showing the hours worked, gross wages, deductions and net wages for each employee." Title 12 of the New York Code of Rules and Regulations, 12 NYCRR § 142-2.6 provides in pertinent part:

> "(a) Every employer shall establish, maintain and preserve for not less than six years, weekly payroll records which shall show for each employee: ...
> (3) the wage rate;
> (4) the number of hours worked daily and weekly, ...;
> (6) the amount of gross wages;
> (7) deductions from gross wages;...

(9) net wages paid . . .

"(d) Employers...shall make such records...available upon request of the commissioner at the place of employment."

Petitioners failed to furnish any records to DOL during the investigation. The documents produced at hearing did not comply with the law's requirements.

The Third Department held in *Angello v National Finance Corp.*, 1 AD3d at 854, that if the employer does not provide the records required under the Labor Law, "regardless of the reason therefore", the presumption favoring the Commissioner's determination based on the employees' complaints applies (*Id.* at 854). In this case the Petitioner failed to produce payroll records required by the Labor Law when requested to do so by DOL investigators.

b. The Order Finding the Petitioners Owe Claimant Vacation Pay is affirmed.

New York does not require employers to provide vacation pay to employees. However, when an employer establishes a paid vacation leave policy for its employees, Labor Law § 198-c requires that the employer provide this benefit in accordance with the terms of the established leave policy. *(Gennes* v *Yellow Book of New York, Inc.*,23 AD3d 520, 521 [2nd Dept 2005]; *Matter of Glenville Gage Co.*, v *State Indus. Bd. of Appeals, 52* NY2d 777 [1980], *affg* 70 AD2d 283 [3rd Dept 1979]; *In the Matter of Joel D. Fairbank and 2nd Nature, LLC,* PR 09-052 (April 27, 2011); *In the Matter of the Petition of Nathan Godfrey [TIA A.S.U.],* PR 09-024 [January 27, 2010]; *In the Matter of the Petition of Center for Fin. Planning, Inc.,* PR 06-059 [January 28, 2008].)

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 *(In the Matter of the 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]), and forfeiture provisions must be explicit (*In the Matter of the Petition of Center for Fin. Planning, Inc., supra*). *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") and *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").

The Petitioner chose to run his business with a simple vacation policy that he viewed as a catch-all for all employee absences. While Marchionda testified that in his view any paid absence from work would be counted against the employee's vacation days, that is not how his business was run in practice; at least as far as how he allowed Pidlisny to operate during the four years of her employment.

We credit the Claimant's testimony that during the course of her employment she had been permitted to make up time that she took off for illness or to take care of personal business, and that, therefore, this time was separate from her accrued vacation time. While there was written evidence and testimony from Marchionda as to his displeasure over Pidlisny's absences, the fact of the matter is that he tolerated her behavior over the entire course of her employment. In addition, the time records that the Petitioner introduced into evidence document the consistent nature of Pidlisny's making up time by working extra time, usually during her lunch hour.

We reject Petitioners' contention that the Order is invalid and unreasonable because the Claimant "owed" the company at the time of her discharge for time that she had previously been paid for. When Pidlisny was discharged in April 2009, she had an accrued vacation right to ten days off and she testified that she had been paid for two and one-half of those days. We credit her testimony and find that the Petitioner's own time records support her position that she had not taken any vacation time in 2009, and that she made up any time that she had taken off for illness or personal business. The Petitioner did not meet his burden of proof that Pidlisny was not entitled to be paid for her full accrued vacation time. Petitioner's own time calendars document the Claimant's testimony that she consistently worked extra time to make up for time taken off. They also support the finding that Petitioner treated vacation time differently from sick time, holidays or other personal time, indicating vacation time as "V," sick time as "S," and Holiday time as "H," for example.

The Claimant earned ten days of vacation time as of January 10, 2009; did not take any vacation time; and was paid for two and one-half days of her 2009 vacation entitlement. She is owed the value of the unused vacation time in the amount of $779.62. Petitioner failed to meet his burden of proof that the Claimant was not entitled to her accrued vacation time. We therefore affirm the Commissioner's determination with respect to the unpaid wage supplements in its entirety.

CIVIL PENALTY

The Order under review includes a 100% civil penalty against the Petitioners. Petitioners argue that the assessment of the penalty is not reasonable or valid because it was based solely on the failure to pay the claim that Petitioners determined was invalid. While Petitioners submitted a good deal of information to the DOL during the course of the investigation, payroll records that were specifically requested and required by law to be maintained were not submitted to the DOL. Other time records were only produced at the hearing. Given the presumption of validity to DOL Orders, and Petitioners failure to meet their burden of proof in contesting the supplemental wage claim; we do not find the civil penalty in this case of $779.62 to be invalid or unreasonable. We therefore affirm the Commissioner's determination with respect to the civil penalty in its entirety.

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 Order to Comply with Article 6 of the Labor Law dated January 8, 2010, is affirmed; and
2. The petition for review be, and the same hereby is, denied.

Anne P. Steyason, 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
July 25, 2013.