STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: PAUL J. MONTALTO, Petitioner, 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 February 11, 2010, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 10-109 RESOLUTION OF DECISION

APPEARANCES

Paul J. Montalto, pro se petitioner.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Michael O. Paglialonga, of counsel), for respondent.

WITNESSES

Paul Montalto, for petitioner;

Frederick Seifried, Labor Standards Investigator, for respondent.

WHEREAS:

On April 9, 2010 Paul J. Montalto (Montalto or petitioner) 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 New York State Labor Law (Labor Law) and an Order Under Article 19 of the Labor Law (together, Orders) that the Commissioner of Labor (Commissioner, respondent or DOL) issued against petitioner, William Francis Ceseratti (Ceseratti) and Gotham City Carriers, Inc. (Gotham City) on February 11, 2010. The Order to Comply with Article 6 of the Labor Law finds that Ceseratti, petitioner and Gotham City failed to pay wages to Luis Bernal (Bernal or

claimant) for the period April 21 - June 26, 2008, and demands payment of $4,758.00 in wages; interest at the rate of 16%, calculated through the date of the Order in the amount of $1,240.99; and a 100% civil penalty in the amount of $4,758.00, for a total amount due of $10,756.99. The Order under Article 19 finds that Ceseratti, petitioner and Gotham City failed to keep and/or furnish true and accurate payroll records for each employee for the period from on or about April 21, 2008 through June 26, 2008, and assesses a $500.00 civil penalty. The *pro se* petition alleges that Gotham City did not have any employees and never employed claimant.[1] The respondent filed an answer on June 9, 2010.

Upon notice to the parties, a hearing was held on April 18, 2012 in Hicksville, 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 Paul J. Montalto

Petitioner's son-in-law, Cesaratti owned two trucking companies, Gotham Logistics and Gotham City.[2] Petitioner, claimant and about a dozen other employees worked for Gotham Logistics. Ceseratti intended to use Gotham City for air freight deliveries, but Gotham City never really got started and remained mostly on paper.

Ceseratti asked Montalto to set up Gotham City and serve as its president because Ceseratti didn't want anything in his own name; Gotham Logistics, too, was not in Ceseratti's name but in that of Montalto's daughter, its president. Petitioner's job duties were to serve as the Gotham Logistics office manager; he supervised only office workers and worked from 10:00 a.m. to 6:00 p.m. He did not work with trucks or supervise those who did, for which Ceseratti employed a day dispatcher. Rather, petitioner did Department of Transportation compliance work, kept track of mileage, and answered the phone.

Claimant worked at night as a dispatcher, starting between 5:00 and 6:00 p.m.; his duties included watching the yard, moving trucks around and taking them to a gas station to be fueled if necessary. Petitioner saw claimant when the latter came in to work, towards the end of petitioner's work day. Ceseratti, not Montalto, hired claimant and gave him instructions about what to do. If problems arose during the night shift, claimant called Ceseratti, not Montalto. Although Montalto was to be the signatory on Gotham City checks, Montalto didn't do any payroll (which was handled by a payroll service), and doesn't know whether claimant was ever moved from the Gotham Logistics to the Gotham City payroll.

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[1] Neither Cesaratti nor Gotham City appealed the Orders.

[2] While the claim named both Gotham City Carriers and Gotham City Logistics, the Order to Comply named only Gotham City Carriers.

When the economy got bad, Ceseratti's business began to fail. Claimant asked Montalto why he was not getting paid. Montalto responded that he couldn't tell him, that he did not do the payrolls or know what claimant was owed, and that he himself had not been paid either. Petitioner told claimant, "You have to talk to my son-in-law." Montalto himself worked for about three months without being paid and left when he found another job. Montalto does not know what happened after that between Ceseratti and claimant. Ceseratti told Montalto that he was in contact with claimant and was going to take care of it.

Montalto has no records. When he left Ceseratti's employment, Ceseratti had all the records pertaining to all his companies.

Testimony of Frederick Seifried

Labor Standards Investigator Frederick Seifried was assigned this file after an investigation by the Department's Albany office. The Claim for Unpaid Wages filed by claimant on July 14, 2008 (Claim), affirmed by claimant to be true, was included in the file assigned to Seifried for introduction at the hearing.

The Claim, against "Gotham City Carrier/Gotham City Logistics," stated that claimant was hired April 21, 2008 by Ceseratti; that Ceseratti and Montalto were "owners" and "superintendent, manager or foreman;" that "William [Ceseratti] is Paul [Montalto]'s son-in-law;" and that wages totaling $4,758.00 were claimed for the period April 21, 2008 to June 26, 2008, when claimant quit "b/c they did not pay me." The Claim stated that claimant's pay rate was $16.00 per hour; listed hours he worked each week and a corresponding figure for gross wages earned, totaling $5,808.00 including overtime; and stated that "At least $1,050.00 gross has been received by claimant," leaving the $4,758.00 balance claimed. The Claim stated that claimant requested his wages from Ceseratti on July 3, 2008, but "He always avoids me. Never wants to see me."

On July 29, 2008 the Department wrote to "Gotham City Carrier" stating that claimant claimed $5,808.00 in unpaid wages,[3] and the employer should either remit that amount within ten days or provide a full statement of its reasons for disagreeing with the claim, including "a copy of any payroll record, policy, contract, etc. to substantiate your position." On November 12, 2008 Senior Labor Standards Investigator Annemarie Culberson (Culberson) wrote to Ceseratti at "Gotham City Carrier" stating:

> "Last we spoke was October 7, 2008. At that time you said you were aware that you owe Luis Bernal wages. You also said that you didn't owe as much as Mr. Bernal was claiming but that you would look into it and send proof of what has already been paid and a check for the difference. To date, we have not heard from you.
>
> Absent documentary evidence, we are upholding this claim.

[3] As noted earlier, the Claim actually indicated that the amount claimed was $4,758.00.

> Please send a check or money order in the amount of $4,758.00 less legal deductions less legal deductions (enumerated) made payable to the Commissioner of Labor within two weeks of the date of this letter.
>
> Failure to respond within the aforementioned time frame will result in the issuance of an Order to Comply...."

On November 18, 2008, the DOL received back the November 12 letter with a notation from the Post Office stating, "Return to Sender. Gotham Logistics Moved Left No Address." On November 24, 2008 the Department again wrote to Ceseratti at Gotham City Carrier stating: "Attached please find a copy of the letter sent you on November 12, 2008 and returned to us this date as undeliverable." On December 1, 2008 the Department received back this letter, which was marked "Return to Sender Not Deliverable as Addressed Unable to Forward."

On December 9, 2008 Culberson wrote to Ceseratti at a home address stating:

> "Attached please find copies of letters sent you on November 12, 2008 and November 24 2008. Both were returned to us. This is being sent to the address you gave me during our telephone conversation of this date."

This letter was not returned.

On June 29, 2009 Culberson completed an Order to Comply Cover Sheet, which contained a document entitled "Background Information – Imposition of Civil Penalty," in which LSI Culberson recommended that a 100% penalty be assessed. The Orders issued on February 11, 2010.

II. STANDARD OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether an order issued by the Commissioner of Labor is "valid and reasonable" (Labor Law § 101[1]). Any objections not raised in the petition shall be deemed waived (*Id.* § 101[2]). The Labor Law provides that an order of the Commissioner shall be presumed "valid" (*Id.* §103 [1]). If the Board finds that the order, or any part thereof, is invalid or unreasonable it shall revoke, amend, or modify the same (*Id.* § 101[3]). Pursuant to the Board Rules (12 NYCRR § 65.30), "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the petitioners' burden of proof in this matter is to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30).

III. 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). Although the Orders under review were issued against Ceseratti, Petitioner and Gotham City (and the record indicates that the Department had two subsequent conversations with Ceseratti), only petitioner requested review. Accordingly, the Board will address only his liability under the Orders.[4] For the reasons stated below, we find that Montalto was not an employer within the meaning of the Labor Law and we therefore revoke the Orders only to the extent that they pertain to the petitioner.

Article 6 of the New York Labor Law defines "employer" as "any person, corporation or association employing any individual in any occupation, trade, business or service (*see* Labor Law § 190[3]). Labor Law § 2(7), like the federal Fair Labor Standards Act, defines "employ" to include "suffer or permit to work" (29 USC § 203[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 FSupp2d 314, 318 n6 [SDNY 2003]). The Board has found individuals to be employers if they possess the requisite authority over employees. *See, Matter of David Fenske (T/A AMP Tech and Design, Inc.),* PR 07-031 [December 214, 2011]; *Matter of Robert H. Minkel and Millwork Distributors, Inc.*, PR 08-158 [January 27, 2010]. In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999], the Court articulated this test for determining employer status:

> "the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality'.... [T]he relevant factors include whether the alleged employer (1) had the power to hire and fire the 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."

No one of these factors is dispositive; the purpose of examining them is to determine economic reality based on a "totality of circumstances (*Id*).

On the record presented in the instant case, there is no evidence that Montalto possessed the requisite authority over the claimant to be an employer under the Labor Law. Petitioner testified without contradiction that he did not hire claimant and was not claimant's supervisor; that he had contact with claimant only when he saw the latter arrive for his night-shift dispatcher's job shortly before Petitioner's own day-shift job as office manager ended; and that when asked by claimant why claimant was not being paid, Petitioner responded that he did not do payrolls or know what claimant was owed and claimant needed

[4] Labor Law § 103(1) provides that "every order directing compliance... shall be valid unless declared invalid in a proceeding brought under the provisions of this chapter." In the present case, as just stated, only Montalto brought a proceeding.

to ask Ceseratti. Petitioner also testified without contradiction that he had nothing to do with payroll, did not sign checks, and did not maintain employment records. Consistent with this testimony, the Claim filed by Bernal stated that it was Ceseratti who hired him and from whom claimant requested unpaid wages, and Ceseratti himself confirmed to the DOL investigator that claimant was owed wages.

Based on the record presented, we find that it was not valid or reasonable to issue the Orders against Petitioner.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Petition filed by Montalto is granted;

2. Insofar as they pertain to Petitioner, the Orders are revoked.

Anne P. Steyason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

ABSENT
Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
September 10, 2012.

ABSENT

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Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
September 10, 2012.