STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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| In the Matter of the Petition of:<br><br>SEAN PIASECKI AND EASTERN MEDICAL SUPPORT, INC.,<br><br>Petitioner,<br><br>To Review Under Section 101 of the Labor Law: Two Order to Comply with Article 6 of the Labor Law, both dated October 6, 2010,<br><br>- against -<br><br>THE COMMISSIONER OF LABOR,<br><br>Respondent. | DOCKET NO. PR 10-374<br><br>RESOLUTION OF DECISION |

## APPEARANCES

Robert J. Krzyz, Esq., for Petitioners.

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

## WITNESSES

Sean Piasecki, President, Eastern Medical Support, LLC, for Petitioners.

Lynda Frey, Claimant, and J.C. Dacier, Senior Labor Standards Investigator, for Respondent.

**WHEREAS:**

On December 1, 2010, Petitioners 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 three Orders to Comply that the Commissioner of Labor (Commissioner or Respondent) issued on October 6, 2010. The first Order is an Order to Comply with Article 6 of the Labor Law (Supplemental Wage Order), which finds that Petitioners failed to pay supplemental wages to Linda Frey (nee Brandt) (Claimant) and demands payment of $2,700.96 for "vacation pay and insurance allowance" due and owing, interest at the rate of 16% calculated to the date of the order in the amount of $182.33,

and a civil penalty in the amount of $2,700.96 (100%) for a total amount due of $5,584.25.[1]

The second Order is an Order to Comply with Article 6 of the Labor Law (Wage Order), which finds that Petitioners failed to pay wages to Claimant in the amount of $38.32, interest at the rate of 16% calculated to the date of the Order in the amount of $3.09 and a civil penalty in the amount of $38.32 for a total amount of $79.73. Petitioners conceded during hearing that the $38.32 Order is due.

The third Order is an Order to Comply Under Article 6 of the Labor Law (Penalty Order) for Petitioners' failure to keep and or furnish accurate payroll records as required under Labor Law §195.4 (Count 1) and for the failure to notify employees in writing or to post notice of hours and/or fringe benefits policy as mandated under §195.5 of the Labor Law (Count 2), and demands payment of $500.00 for each violation for a total of $1,000.

The petition challenges the Supplemental Wage Order as unreasonable or invalid on the grounds that Claimant was paid her vacation pay and was not entitled to reimbursement for insurance premiums or for cell phone usage. The Supplemental Wage Order is based on the allegation that Claimant was entitled to 80 hours of annual vacation in both her first and second calendar year's employment. Petitioner contends that Claimant was demoted after her first calendar year's employment, which resulted in her entitlement, in her second year, to 40 hours of annual vacation leave and not the 80 hours she earned in her first year employment.

The petition challenges the insurance premiums under the Supplemental Wage Order as unreasonable or invalid on the grounds that Claimant was not entitled to payment for such premiums because she did not request such payment and because Eastern Medical Support was not required to make such payments because of its financial condition. The petition also challenges the Supplemental Wage Order's inclusion of reimbursement for cell phone usage on the grounds that Petitioners never promised Claimant such reimbursement.

Petitioners moved, at hearing, to amend the petition to include a challenge to the 100% Supplemental Wage Order Civil Penalty, and without objection the motion was granted. Petitioners also moved at hearing to amend the petition to include the Civil Penalties (Counts 1 and 2) and upon objection the motion was denied. The Board hereby adopts these rulings.

The Commissioner responds that the Supplemental Wage Order is reasonable and valid in all respects; that Claimant was entitled to 80 hours of vacation pay in her second year; that she was entitled to payment for her medical insurance at $77.00 a paycheck for 7 paychecks for a total of $539.00; and, that petitioner Piasecki promised her at the time of hire that she would be reimbursed for use of her cell phone.

Upon notice to the parties a hearing was held on July 11, 2012, in Albany, New York, before Jeffrey R. Cassidy, Board Member, and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary

[1] Respondent's Answer calculates the $2,700.96 Supplemental Wage Order as including $1,072.96 (vacation pay), $539.00 (medical insurance), and $1,089.00 (cell phone).

evidence, to examine and cross-examine witnesses, make statements relevant to the issues, and make closing arguments.

## SUMMARY OF THE EVIDENCE

*Vacation Pay and Medical Insurance Payments*

Eastern Medical Support, Inc. hired Claimant as controller/office manager on February 15, 2009, and terminated her employment on April 5, 2010. On January 26, 2009, Claimant and Sean Piasecki, President of Eastern Medical Support, entered into an agreement detailing the conditions of Claimant's employment. Relevant to this matter is a provision for two-weeks vacation per year, which the Claimant and Piasecki agreed at hearing meant 80 hours. The 80-hour entitlement was to continue for Claimant's first 4 years of employment and was to increase thereafter. The specific language of the employment agreement is:

> "2 weeks vacation per year from date thru 4th year, 5th thru 10th year 3 weeks per year – 11th thru retirement lets discuss when we get there ...."

Piasecki testified that Eastern Medical Support had used anniversary dates for vacation accruals, but that as the company expanded and more employees were hired it became difficult to track each employee's service, and vacation accruals were subsequently measured in calendar years.

Claimant's employment agreement also provided that Eastern Medical Support would pay her health and dental insurance for the first year at a total approximate cost of $77 biweekly. The agreement states that after the first year, "I [Claimant] would like this amount to go towards increasing my salary as I am planning on obtaining insurance through Curt's[2] employer."

The employment agreement was based on an earlier unsigned draft that Claimant wrote and presented to Piasecki. Piasecki made some changes to the earlier draft, including a change in Claimant's proposal to receive 3 weeks vacation after 8 years and a written notation that the dental and health insurance was for "single coverage." The initial draft, and the signed agreement, included the statement that "increase in salary yearly based upon . . . how well the company is doing overall." The agreement does not contain a provision for cell phone reimbursement.

Upon termination, Petitioners paid Claimant for 24 vacation hours based on their contention that she was entitled to only 40 hours for the calendar year 2010 and that she used 16 hours in February of that year. Respondent agrees that Claimant used 16 hours and was paid for 24 hours; however, he believes that Claimant is owed vacation pay for 56 hours, or $1,072.96 ($19.16 per hour x 56 hours). The claim of 56 hours is based on 80-hours vacation credit for 2010, payment for 16 hours vacation credit earned in 2009, deductions for the 16 hours Claimant took in 2010 and the 24 hours paid when she was terminated.

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[2] Curt is Claimant's husband.

Petitioners respond that Claimant was not entitled to reimbursement for the 16 hours not used during the 2009 calendar year because under a "use it or lose it" policy in Eastern Medical Support's employee manual, Claimant lost those hours because she did not request that they be converted to pay by the end of 2009. The employee manual states:

> "Employees may, at their option, choose to have their unused vacation time at the end of the calendar year be paid to the employee in straight time earnings. You as the employee are responsible for requesting payment for unused vacation time. If not requested, it will not be paid. All unused vacation at year-end will be lost with the start of the beginning of the new year."

Claimant did not dispute that she received the employee manual, but testified that she believed that her vacation entitlements ran one year from her hiring date, and not from that date to the end of the calendar year. She added that she took 16 hours immediately prior to her one-year anniversary date in 2010 because she did not want to lose the time.

Petitioners argue that Claimant was entitled to only 40-hours vacation in 2010 because at a meeting on January 4, 2010, Eastern Medical Support demoted and relieved her of her office manager responsibilities. Piasecki testified that he, Claimant, and Eastern Medical Support co-owner Richard Kwiatowski attended that meeting, and that she was told that because of a failure to meet expectations and her errors, her job duties would change and that "the only punishment was . . . the reduction of vacation hours and the health benefits." Piasecki explained the reduction of vacation hours from 80 to 40 in Claimant's termination letter:

> "In our original agreement letter signed in 2009, Eastern Medical Support, agreed to grant you 80 hours of vacation time based on ***accepting and working in the position of "Controller / Office Manager."*** However, as you are aware, Eastern Medical Support relieved you of your duties as Office Manager in January 2010 and therefore you only qualify for 40 hours of vacation time. As per payroll records, you used 16 hours of vacation time in February, leaving a total of 24 hours of vacation time."

Claimant denied ever being told that she was demoted and denied attending a meeting on January 4, 2010. She also testified that she was never told, prior to receiving her termination letter that her vacation was reduced.

Claimant relied on her paystubs that show 16 hours available vacation in the pay periods ending January 10 and February 7, 2010, and 80 vacation hours available in her paystubs ending March 7 and April 4, 2010. According to Claimant the 16 hours in her 2010 paystubs issued prior to her one-year anniversary date reflected the carryover of her used vacation time from her hiring date. After her anniversary date, her paystubs listed 80 vacation hours for the next one-year employment period. She also relied upon a "Paid Time Off List" dated April 5, 2010, the date of her termination, which she described as an Eastern Medical Support computer generated list showing her vacation availability as 80 hours available and 16 hours used.

Piasecki testified that as controller, Claimant was responsible for the payroll, and that she included 80 hours after her anniversary date even though she was only entitled to 40 hours. In response to Claimant's actual paystubs, Petitioner described other paystubs for biweekly pay periods from January 11 through April 18, 2010 that show "Vacation Avail." as "24" with the exception of the February 8 – February 21, 2010 pay period which, in addition to showing 24 vacation hours available, also shows "Va. Accrued. 80." He explained that the paystubs showed 24 hours because she was only entitled to 40 hours after January 1, 2010, and that she had taken 16 hours in February 2010.

However, Piasecki testified that he copied these paystubs from the "actual 'Quick Books' and that they were not the actual paystubs that Claimant received. Further, Piasecki explained that when Claimant was terminated, he manually changed her vacation accrual to reflect what he believed were the correct accruals.

*Health Insurance Payment*

Claimant's signed employment agreement provided for health and dental insurance:

> "Eastern Medical to pay my health insurance & dental insurance for the 1st year. This will be a cost of approximately $77 biweekly for both. After the 1st year, I would like this amount to go towards increasing my salary as I am planning on obtaining insurance through Curt's employer. Single Coverage"

Claimant testified that she was not paid the $77 for the 7 pay periods from January 1, 2010 through her termination. At hearing, Piasecki conceded that the Claimant's employment agreement required her salary to increase by $77 a week for waiving her health insurance when she went on her husband's plan, but contended that Claimant never raised it as an issue or concern until she was terminated. He also relied on the last paragraph of the employment agreement:

> "Annual review – increase in salary yearly based upon performance and how well the company is doing overall. As the company grows and starts to make more profit, Lynda's [Claimant's] salary will be reviewed accordingly."

Piasecki explained that this provision was relevant as the health insurance payment was to be included in salary and that Eastern Medical Support had serious financial problems. Claimant testified that on December 29, 2009, she terminated her insurance when she submitted a change of enrollment form with the insurance carrier, CDPHP, which indicated "marriage/on spouse's coverage." She also testified that at that time she asked Piasecki when he was going to start paying her for the health insurance premium and he told her that Eastern Medical Support could not afford it and that the financial condition of the company would get better and it would then be included in her pay.

Claimant also testified that her employment agreement controlled her vacation and health insurance payments, not the employee manual, and relied specifically on the following manual provision:

> ***"By signing below, you acknowledge that you have read and understood the policies outlined in this Employee Manual.*** You agree to comply with the policies contained in the Manual and to read and understand any revisions to it and be bound by them. You understand this Manual is intended only as a general reference and is not intended to cover every situation that may arise during your employment. This Manual is not a full statement of Easter Medical Support, LLC's policy. Any questions regarding this Manual can be discussed with your supervisor or upper management."

*Cell Phone Reimbursement*

Claimant testified that she is entitled to payment of $99 a month for 10 months, or $1,089.00, for reimbursement of cell phone use. Claimant stated that when she was hired, Piasecki told her that because she was frequently contacted at home, Eastern Medical Support would pay her cell phone bills. She emphasized that her cell phone number was on her business card, and that she asked Piasecki several times for reimbursement, but that he responded that the company was not in a financial position to do so. Claimant also testified that in January 2010, she told Piasecki not to call her after hours and that she was not going to continue to pay for the cell phone if she wasn't going to be reimbursed.

Piasecki testified that he never had a conversation with Claimant over cell phone reimbursement and that he had no agreement with her regarding it.

*Civil Penalty*

Senior Labor Standards Investigator J. C. Dacier testified that he did not do the investigation of this matter, but reviewed the Department of Labor's (DOL) file the day prior to the hearing. He identified a DOL document titled "ISSUANCE OF ORDER TO COMPLY COVER SHEET," which he described as including measurements of the various factors for determining the seriousness of Labor Law violations. That document shows Senior Labor Standards Investigator Lori Roberts' recommendation of a 100% civil penalty based on Eastern Medical Support being in business for more than 3 years, and that it was "Not generally cooperative . . . ER failed to respond."

At hearing, Petitioners admitted to not responding to the Department of Labor's correspondence regarding the investigation, but argued that Piasecki was consumed by saving the business after an IRS investigation.

## GOVERNING LAW

Standard of Review and Burden of Proof

The Labor Law provides that 'any person . . . may Petition the board for a review of the validity or reasonableness of any . . . order made by the [C]ommissioner under the provisions of this chapter" Labor Law 101 § [1]). It also provides that a Commissioner's order shall be presumed "valid" (Labor Law § 103 [1]).

A petition filed with the Board that challenges the validity or reasonableness of an order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). It is a petitioner's burden at the hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board Rules of Procedure and Practice § 65.30 at 12 NYCRR § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it"]; *Angelo v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]). It is therefore Petitioners' burden to prove, by a preponderance of the evidence, that vacation pay, health and dental premium payments, and cell phone reimbursement are not due and owing. It is also Petitioners' burden to prove, by a preponderance of evidence, that the Civil Penalty is invalid or unreasonable.

## DISCUSSION AND FINDINGS

The Order's Finding that Petitioners Owe Claimant Vacation Pay is Reasonable and Valid.

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 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 09-059 [January 28, 2008]; *In the Matter of the Petition of Joel D. Fairbank and 2nd Nature, LLC*, PR 09-052 [April 27, 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 . . . [to pay those benefits] within thirty days after such payments are required to be made."

Petitioners argue that Claimant's 80 vacation hours that were included in her employment agreement changed to 40 hours as a result of a demotion that occurred in early January 2010. As she used 16 hours in February 2010, Petitioners compensated her at termination for 24 hours. However, Claimant claims 56 hours are due and owing because the 80 hours did not change; that no demotion ever took place; and, that she was never told that her vacation hours were reduced. Further, Claimant contends that she was owed 16 hours from unused vacation time that carried over from 2009 and that those were the hours she used in February 2010. She agrees that she was paid 24 hours when terminated, and argues that she is owed the balance of 56 hours.

We find Petitioners violated the Labor Law by failing to compensate Claimant for 56 vacation hours when she was terminated. Claimant's initial employment agreement provided for 80-hours annual vacation. She was entitled to be paid for those hours, less time taken and reimbursements made at termination, unless Petitioners can show that the terms of Claimant's initial agreement were altered with clear notice to her. They must also show that she was not entitled to carry over into 2010 Claimant's 16

unused hours from 2009 and that the 16 hours she used in February 2010 were from calendar year 2010's accruals.

We do not need to decide whether Claimant was demoted and as a result was told that her vacation entitlement was reduced. Claimant's paystubs commencing after her one-year anniversary date support an entitlement to 80 hours. Petitioners argue that Claimant was in charge of the payroll and took it upon herself to include 80 hours. However, the evidence shows that the payroll was reviewed and approved by Piasecki, and by such review and approval he did not dispute Claimant's entitlement to 80 hours vacation. Records offered by Petitioners suggesting that these paystubs were incorrect are of little value as they were constructed at the time of termination, retroactive to January 2010.

We also find that Claimant was entitled to carry over 16 unused hours from 2009 into 2010. Claimant's employment agreement is not clear whether her vacation accruals were on a calendar or anniversary date basis. That agreement stated that her vacation was "per year from hired date thru 4th year . . . ." Piasecki changed the language to "2 weeks vacation, 1st – 4th year . . . ." It is unclear from either document whether "year" meant anniversary year or calendar year.

The employee manual, which we find covered Claimant's employment, at least as of the date she signed it on August 10, 2009, for terms and conditions of her employment not covered by her individual employment agreement, is clear that vacation accruals run from hiring date to the end of the calendar year. In order to be paid for unused vacation, the manual requires employees to request payment for such time "at the end of the calendar year."

However, Claimant believed that she was entitled to carry over time from 2009 into 2010 and credibly testified that she used 16 hours immediately prior to her anniversary date because she believed she would otherwise lose those hours. Her paystubs for pay periods ending January 15, and February 12, 2010, show 16 hours accrual, which suggests that her accruals commenced on her anniversary date, and not at the beginning of the calendar year. It also suggests that she was allowed to carry over her 16 unused hours into 2010.

We resolve the disparity between the language of the employee manual and the pre-anniversary date paystubs in favor of Claimant. Just as Petitioners were responsible for the Claimant's paystubs showing 80 hours vacation accruals after her anniversary date, Petitioners were equally responsible for Claimant's showing a carry over of 16 hours in her pre-anniversary date paystubs. It may well be that Petitioners believed that the "use it or lose it" policy was linked to calendar years for Claimant as well as others covered by the employee manual. However, the evidence shows that Piasecki was, or should have been, aware that in Claimant's case she was led to believe that her vacation accruals ran to her anniversary date, and not to the end of the calendar year.

The Order's finding that Petitioners Owe Claimant for Reimbursement for Medical Premiums is Reasonable and Valid.

We find that Claimant was entitled to payment of health and dental premiums as part of her salary commencing January 1, 2010. Claimant's employment agreement clearly required Petitioners to add to Claimant's biweekly pay, effective January 1, 2010,

$77 for her termination of health and dental insurance. Unlike the notice provision contained in the employee manual for conversion of vacation credit, the agreement did not include any specific notice requirement. Moreover, Claimant's employment agreement clearly acted as notice upon Eastern Medical Support of her desire to select the premium conversion option.

Petitioners' position that Claimant never raised the issue until her termination is unconvincing. First, the agreement itself raised the issue and no further notice had to be given. Also, Claimant raised the issue with Piasecki, not only at the time she declined insurance with CDPHP, but in subsequent conversations with him, and in a February 25, 2010 email.

Petitioners also argue that Claimant's salary, as contained in her employment agreement, was contingent on "how well the company was doing overall;" that the health insurance premium conversion benefit was a salary benefit: and, that the company was doing poorly. The employment agreement, however, does not support an interpretation that the promise of insurance premium conversion was dependent on Eastern Medical Support's financial condition. This provision comes under the heading performance of the company. The conversion benefit is contained in a separate paragraph and is not under the "Annual review" heading. While the conversion benefit would increase Claimant's salary, this is not the type of salary increase envisioned by the "Annual review" paragraph.

Petitioners Do Not Owe Claimant for Cell Phone Usage.

Respondent's contention that Claimant is owed $1,089 for cell phone usage is unsupported by the evidence. Claimant drafted the original employment agreement, which Piasecki only slightly modified. Despite considerable specificity regarding Claimant's employment benefits, reimbursement of cell phone usage is not contained in either document. Moreover, even though the employment manual may cover conditions of employment not contained in Claimant's employment agreement, it makes no mention of employee cell phone reimbursement.

Petitioner challenges Claimant's testimony that he promised Claimant cell phone reimbursement. He not only denied making such a promise but also stated that Claimant never asked for cell phone reimbursement. Claimant testified that Piasecki told her, when she was initially hired, that her cell phone charges would be reimbursed. We resolve the differences in testimony in Petitioners' favor. It is unlikely that Claimant would not have included cell phone reimbursement in her employment agreement draft had she been promised that benefit. This is especially so given the alleged proximity of the promise to the execution of the employment agreement.

We also find that the Supplemental Wage Claim Order does not include cell phone reimbursement and only lists "vacation and insurance allowance." Even if the evidence weighed in Respondent's favor on this issue, we would find no monies were due and owing as there is no order before us including cell phone charges.

The Civil Penalty is Reasonable and Valid.

We find that the 100% Civil Penalty is reasonable and valid, but that the amount assessed must be modified based on the reduction in the amount of benefit payments due.

Senior Labor Standards Investigator J. C. Dacier testified that the 100% penalty was determined by the length of time Eastern Medical Support was in business and because of its general failure to cooperate in the Department of Labor's (Department) investigation. Dacier identified these factors as standard Department criteria used in measuring the amount of civil penalty. Petitioners offered no evidence that the penalty is invalid or unreasonable, and admitted to their lack of cooperation in the investigation.

**NOW , THEREFORE IT IS HEREBY RESOLVED THAT:**

1. The Order to Comply with Article 6 of the Labor Law dated October 6, 2010, (Supplemental Wage Order) in the amount of $2,700.96 is reduced by $1,089.00 for cell phone usage for a total of $1,611.96 due and owing.

2. The Order to Comply under Article 6 of the Labor Law dated October 6, 2010 (Wage Order), is affirmed in its entirety.

3. The Order to Comply Under Article 6 of the Labor Law (Penalty Order) for Petitioners' failure to keep and or furnish accurate payroll records and for the failure to notify employees in writing or to post notice of hours and/or fringe benefits policy is affirmed in its entirety.

4. The Civil Penalty and interest shall be recalculated to reflect these findings.

5. The petition for review by, and the same hereby is, otherwise denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

ABSENT
Jeffrey R. Cassidy, Member

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

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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
September 10, 2012.