STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
WALTER STUART AND H&F TAXI, INC. (T/A STUART'S TAXI),	:	
Petitioners,	:	DOCKET NO. PR 10-399
To Review Under Section 101 of the Labor Law: Two Orders to Comply with Article 6 and an Order under Articles 6 and 19 of the Labor Law, all issued October 15, 2010,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Perry Stuart, *pro se* for Petitioners.[1]

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

WITNESSES

Perry Stuart, Steven Villani and Heyward Matthews Jr., for Petitioners.
Senior Labor Standards Investigator Frank King, for Respondent.

WHEREAS:

On December 13, 2010, Perry Stuart, on behalf of Petitioners Walter Stuart and H&F Taxi, Inc. (T/A Stuart's Taxi) (H&F), filed a petition with the Industrial Board of Appeals (Board) to review two Orders to Comply with Article 6 of the New York State Labor Law (Labor Law) and an Order under Articles 6 and 19 of the Labor Law that the Commissioner of Labor (Respondent, Commissioner or DOL) issued against Petitioners on October 15, 2010. Petitioners filed an amended petition on February 4, 2011.

[1] Perry Stuart testified that he is vice president of and currently runs Petitioner H&F Taxi, Inc. (T/A Stuart's Taxi), and is the executor of Petitioner Walter Stuart's estate.

The first Order under Article 6 (Wage Order) directs payment of $690.00 in wages due to Heyward Matthews Jr. (Claimant) for the period May 1, 2007 to August 16, 2008, interest at 16% per annum calculated to the date of the order at $71.68, and a civil penalty in the amount of $690.00, for a total amount due of $1,451.68. The second Order under Article 6 (Supplemental Wage Order) directs payment of $780.00 in vacation pay due to Claimant for the period from May 1, 2007 to August 16, 2008, interest at 16% per annum calculated to the date of the order at $81.04, and a civil penalty in the amount of $780.00, for a total amount due of $1,641.04. The third Order under Articles 6 and 19 (Penalty Order) directs payment of $500.00 in civil penalties for failing to notify employees in writing or to post notice of fringe benefits policy for the period from May 1, 2007 through May 2, 2008, and $1,000.00 in civil penalties for failing to keep and/or furnish true and accurate payroll records for each employee for the period May 1, 2004 through August 16, 2008, for a total under the Penalty Order of $1,500.00.

The petition states that Walter Stuart passed away on March 1, 2010, and alleges that Matthews was owed no money, and that all employees including Matthews are made aware of Petitioners' benefits policy which does not include vacations. The amended petition alleges that H&F does not offer vacation pay and that employees "are all notified of our vacation policy in writing, and that Petitioners have no record of any demand by the DOL for payroll records but "in fact have the necessary records." It also contests the civil penalties. Respondent filed an answer and demand for a bill of particulars dated March 17, 2011.

Upon notice to the parties, a hearing was held on January 30, 2013 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 and to make statements relevant to the issues. Post hearing briefs were filed by Petitioners on March 1, 2013 and the Respondent on March 4, 2013.

SUMMARY OF EVIDENCE

The Claims

Matthews filed two sworn claim forms with the DOL on August 25, 2008, both stating that he was employed as an auto mechanic by H&F from May 1, 2004 to August 16, 2008, that he quit, and that his pay rate was $15.00 per hour. The first claim (Wage Claim) avers that Claimant is owed $690.00 in wages for the payroll week ending August 12, 2008 (8-12-08), that he worked 46 hours and 4.5 days during this period, that total gross wages earned for the week was $370.00, and that no wages were paid. Attached to the claim were two pay stubs, for pay periods ending "8-5" and "8-12," each showing gross and net pay to Claimant of $370.00 and $334.88 respectively. Neither stub contains the number of hours worked or a pay rate. The second claim (Vacation Claim) avers that Claimant is owed $780.00 in vacation pay for one week's vacation pay for the payroll period August 4 through August 10, 2008 based on company policy, and that he previously received two weeks' vacation pay in the amount of $1,560.00.[2]

[2] Although the claims list Claimant's last day worked as August 16, 2008 (8/16/08) and state he was paid in both cash and check, there was no testimony or evidence concerning work performed after August 12 or payment in cash nor did the DOL base its orders on those aspects of the claim forms.

Testimony of Steven Villani

Villani testified that he has been H&F's manager since April 2007. Walter Stuart returned to the company in 2007 and a new vacation policy went into effect. Villani and Walter Stuart explained the new policy to Matthews, and it was posted in the dispatch area. Under this policy "[h]e could take a vacation...but then he is not going to get paid for the vacation." That policy was stated in a one-paragraph document signed by Walter Stuart reading:

> "All employees of H & F Taxi (D/B/A Stuart's Taxi) are potentially eligible for holiday time off and paid sick days depending on your position and rate of pay. Although there are no paid vacations, time off for vacations as well as holidays and sick days can be negotiated with Mr. Stuart. Thank you."

After the claim was filed, Villani had a conversation with Matthews and "explained to him that we went over the policy and you don't get vacation pay. [Matthews] said, okay, you know, he didn't remember the policy."

Testimony of Claimant Heyward Matthews Jr.

Claimant Matthews was called as Petitioners' witness. At the time Matthews filed his claim, he had just quit his job at H&F. He currently again works there as a mechanic. When Claimant began work at H&F "under Mr. Bruce,... he used to always give me vacations paid," and this continued from 2004 "until the time he left" and Walter Stuart came in. Claimant saw the policy signed by Walter Stuart in the dispatcher's office, and remembers

> "Steve [Villani] mentioning it to me back in, I don't know '07, somewhere along in there, I really don't remember, but he did mention it to me and it's also posted inside of where the dispatcher works at, but I never really paid it any attention because when I was working under Mr. Bruce,... I always used to get my little vacation pay and stuff like that, so I didn't really pay it any attention until recently."

Matthews filed the Vacation Claim notwithstanding the vacation policy instituted by Walter Stuart because "I went on vacation that particular year and I was expecting the same thing." Matthews now believes he was not owed vacation pay.

With regard to the wage claim, Claimant testified that during the relevant period, he received a check for $370.00 each week and when he wrote "$370.00" on the wage claim in a column headed, "Total gross wages earned this week," for the week ending August 12, 2008, it meant he received a check for $370.00 and cashed it. Asked by Petitioners why he wrote $690.00 on the Wage Claim as the "Total amount of wages due," Claimant testified: "I don't remember, Mr. Stuart, because I was pissed off at the time.... I quit and I felt that I was due a week and a vacation, you know.... I just don't remember. I'm sorry, I just don't remember." After he filed the claim, Matthews went over it with Villani:

> "Q: And is there anything you can clarify?

"A: Yes, there were errors, it was an error. And the way he explain it to me, I was wrong and you were right.
"Q: After the conversations with Mr. Villani, do you believe now you were owed that $690 or no?
"A: No, no."

On cross examination by the DOL's counsel, Claimant testified that when he filed the claims, he swore and believed they were correct, "but I just don't remember right now." He confirmed the claims' statement that his pay rate was $15.00 per hour and that he was not paid the amounts claimed. On Petitioners' redirect, Matthews testified that he no longer feels he was owed money and "I made a mistake" in filing the claims. Matthews also repeatedly stated that "I don't wish to pursue the claim anymore and I forgive the debt."

Testimony of Senior Labor Standards Investigator Frank King

LSI King was one of the investigators in this matter and prepared the documentation recommending the issuance of the orders. On October 28, 2008, after discussing the claims with Matthews by telephone, King called Walter Stuart and notified him of the claims. With respect to the Wage Claim, Walter Stuart told King that Matthews was paid in full and that he had stolen equipment, to which King replied that an alleged theft did not justify non-payment of wages. King also notified Walter Stuart of the Vacation Claim but "Mr. Stuart did not respond to this at all." On October 29, 2008, Walter Stuart sent King a fax stating, "As per your request, we enclose a copy of employee's last payroll check;" this cancelled check (the same one for which Matthews, when filing his claims, provided the DOL with a stub showing "pay period ending 8-12") was dated August 14, 2008 and was in the amount of $334.88. The cancelled check was the only documentation provided by Petitioners during the DOL's investigation. After receiving the cancelled check, King spoke about it with Matthews in another telephone conversation, on October 30, 2008, in which Claimant

> "acknowledged receiving such payment, but still insisted that the employer still owes him one week of wages not for the last week of his employment, but for the initial week of his employment due to a lag week of payroll, meaning the employer pays not immediately after the week ending, rather a week later."

Since this check did not show a wage rate, hours of work or covered period, and did not satisfy the $690.00 the Wage Claim had stated was owed, King did not consider it to invalidate or reduce the claim. On March 19, 2009 King completed an Issuance of Order to Comply Cover Sheet recommending a 100% civil penalty on the wage and vacation pay orders based on two prior violations of the Labor Law by Petitioners (a February 6, 2008 order for failure to pay wages in violation of Labor Law § 191[1][d]; and a March 26, 2006 order for failure to pay minimum wages in violation of Labor Law §652[1]), and Petitioners' lack of cooperation in that "ER denied owing any wages, yet no payroll records were furnished for inspection." On October 15, 2010 the DOL issued the present orders.

Rebuttal Testimony of Steven Villani and Claimant Heyward Matthews Jr.

Although Villani was H&F's manager, the DOL never contacted him or requested records from him. Matthews never met or spoke over the telephone with King.

Payroll Records

Petitioners introduced in evidence a payroll journal (which Perry Stuart stated he believes is maintained on a weekly basis by H&F's bookkeeper) listing Claimant's gross and net pay and deductions for weekly pay periods ending 1/2/07 through 8/12/08. The journal was provided to the DOL for the first time in December 2012, in response to the DOL's demand for a bill of particulars. For each week listed in the journal, a "time worked" column is left blank and no pay rate is recorded. The recorded gross and net weekly pay was, respectively, $370.00 and $334.88, except for three weeks in June or July 2008 for which the recorded gross pay was $246.66, $61.67 and $308.33. The payroll journal indicates that Matthews was paid for three vacation days during the summer of 2007: two vacation days during the week ending July 7, 2007, and one vacation day during the week ending July 10, 2007.

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]). 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]). Petitioners have the burden of proving that orders under review are invalid or unreasonable. *See* Board Rule of Procedure and Practice (Board Rule) § 65.30, 12 New York Codes, Rules and Regulations (NYCRR) § 65.30; State Administrative Procedure Act § 306; *Matter of Angello v Nat'l Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]. It is therefore Petitioners' burden to prove by a preponderance of the evidence that the Supplemental Wage Order, Wage Order and Penalty Order are invalid or unreasonable.

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)."

Petitioners Met Their Burden With Respect to the Supplemental Wage Order

Based on the evidence before the Board, we find that the Petitioners met their burden of proving that the Supplemental Wage Order was unreasonable and invalid.

New York does not require employers to provide vacation pay, but when an employer establishes a vacation policy, Labor Law § 198-c requires that the employer provide this benefit in accordance with the established terms. *(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], *aff'g* 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 sick leave, vacation, personal leave, holidays and hours."

In the present case, Petitioners allege that H&F's policy was publicly posted and stated that while time off "can be negotiated" with Walter Stuart, "there are no paid vacations." Villani testified that Walter Stuart instituted this policy when he returned to the company in 2007, and both Villani and Walter Stuart himself discussed it with Claimant. Claimant testified he saw the policy and Villani "did mention it to me," but Claimant "never really paid it any attention" because from 2004 until Walter Stuart's return, paid vacation was provided. Claimant also testified that he now believes he was not owed vacation pay for 2008. There is no evidence or basis to find that Petitioners' policy as of 2008 was to pay for vacation time, and the Supplemental Wage Order cannot be sustained.

Petitioners Met Their Burden With Respect to the Wage Order

Based on the evidence before the Board, we find that Petitioners have met their burden of proving that the Wage Order was invalid or unreasonable.

The Wage Claim states that Claimant is owed $690.00 in wages for the week ending August 12, 2008 (8-12-08), for 46 hours and 4.5 days worked; that total gross wages earned for the week was $370.00; and that no wages were paid. A wage stub for the period ending "8-12," attached to the claim form, showed gross and net pay to Claimant of $370.00 and $334.88 respectively, and Petitioners also provided the DOL with a "last payroll check," dated August 14, 2008, in the amount of $334.88, which Petitioners allege constituted full payment for the week. King testified that when he asked Claimant about the check, Matthews acknowledged receiving it but "insisted that the employer still owes him one week of wages not for the last week of his employment, but for the initial week of his employment due to a lag week of payroll."[3] At the hearing, Claimant testified that he does not remember why he wrote $690.00 as the amount due except that "I was pissed off at the time.... I quit and I felt that I was due a week and a vacation," and that after speaking with Villani, he no longer believes he was owed the $690.00.

The payroll journal introduced by Petitioners indicates, and Claimant's testimony confirms, that he was paid $370.00 almost every week in 2007 and 2008. The journal did not state Claimant's wage rate or hours worked (an issue discussed in this decision's next section), and thus, sheds no light on how long Matthews actually worked either during the week ending August 12, 2008 (8-12-08) (when the Wage Claim states he worked 46 hours during 4.5 days) or during earlier weeks (when, applying the $15 per hour wage rate to which he testified without dispute, gross pay of $370.00 corresponded to 24 hours, 40 minutes). Thus, the payroll journal does not exclude the possibility that Claimant worked long hours and was owed more than the $370.00 he was paid (at $15 per hour, $690.00 corresponds to 46 hours). However, there was no testimony concerning Matthews' work schedule either during his last week of work or generally, nor did the DOL contend that $370.00 was not adequate for his last or any other week.

On the contrary, King testified the reason the DOL did not accept as adequate the "last

[3] While Matthews at the hearing did not recall speaking with King, we credit King's testimony.

payroll check" furnished by Petitioners was that given Matthews' post-claim remark about a "lag week," the August 14th check (even though the pay stub for that check listed a "pay period ending" of 8-12) might actually have been for an earlier pay period, leaving the last week still uncompensated. No evidence at all supports that theory. In light of the undisputed evidence that Matthews was paid for the period ending 8-12-08 referred to in the Wage Claim, his inability to remember why he wrote $690.00 as the amount claimed, and his testimony that he no longer believes he was owed wages, the Wage Order cannot be sustained.

The Penalty Order Is Affirmed As Modified

Count 1 of the Penalty Order directs payment of $500.00 in civil penalties for violating Labor Law § 195[5] by failing to notify employees in writing or to post notice of the fringe benefits policy. Count 2 imposes a civil penalty of $1,000.00 for failing to keep and/or furnish true and accurate payroll records for each employee. As discussed above, undisputed evidence shows that Petitioners did post notice of their fringe benefits policy, posting in the dispatch office a policy stating that "there are no paid vacations." Accordingly, Count 1 of the Penalty Order cannot be sustained.

Because of the Petitioners' failure to provide documents which show the rate of pay and daily and weekly hours worked, we affirm Count 2 of the Penalty Order. An employer's obligation to keep adequate employment records is codified in Labor Law § 195 and 661 as well as in the New York Codes, Rules and Regulations. Specifically, 12 NYCRR § 142-2.6 provides that an employer must maintain and preserve for a period of six years weekly payroll records showing, *inter alia*, the employee's wage rate, daily and weekly hours worked, gross wages, deductions, any allowances claimed as part of the minimum wage, and net wages. Upon request of the Commissioner, the employer is required to make the records available at the place of employment. 12 NYCRR § 142-2.7 further provides that the employer shall furnish each employee with a statement with every payment of wages, listing hours worked, rates paid, gross wages, any allowances claimed as part of the minimum wage, deductions and net wages. This required recordkeeping provides proof to the employer, the employee and the Commissioner that the employee has been properly paid. The importance of each element required by §§ 142-2.6 and 142-2.7, including the employee's wage rate and daily and weekly hours worked, is well illustrated by the present case in which, as discussed in this decision's previous section, it is impossible to tell from the payroll journal how long Claimant worked each week or whether the wages recorded for any week were complete and correct.

In the present case, it is undisputed that Petitioners did not comply with the record-keeping requirements of 12 NYCRR §§ 142-2.6 and 142-2.7. Key elements of required record-keeping – records of the employee's wage rate and daily and weekly hours worked – were missing from both the payroll journal introduced by Petitioners at the hearing, and the pay stubs attached to the claims Claimant filed with the DOL.

Labor Law § 218[1] states that where the Commissioner determines that an employer has violated the law in a respect

> "other than the employer's failure to pay wages, benefits or wage supplements found to be due, the order shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand

> dollars for a first violation, two thousand dollars for a second violation or three thousand dollars for a third or subsequent violation. In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation,…. the history of previous violations…."

We find that in assessing a $1,000 civil penalty, the Commissioner gave due consideration to the statutory factors and that the penalty imposed is reasonable and valid. The record-keeping violation was serious, as discussed above, and King testified without contradiction that Petitioners had a history of previous violations of the Labor Law.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Supplemental Wage Order is revoked; and

2. The Wage Order is revoked; and

3. Count One of the Penalty Order is revoked and Count Two is affirmed; and

4. The Petition is granted to the extent set forth above, and 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
October 2, 2013.