

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 ROBERT H. WEISS, :
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 Petitioner, :
 :
 To Review Under Section 101 of the Labor Law: :
 Two Orders to Comply With Article 6 of the Labor :
 Law and an Order Under Article 19 of the Labor Law, :
 each dated February 8, 2011, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PR 11-104
RESOLUTION OF DECISION

APPEARANCES

Robert H. Weiss, petitioner pro se.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Jake A. Ebers of counsel), for respondent.

WITNESSES

Labor Standards Investigator Armando Gonzalez, Sandra Murtagh, Peter Kamran, and Robert H. Weiss for petitioner.

Labor Standards Investigator Armando Gonzalez, Jennifer Bailey, and Sandra Murtagh for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on April 7, 2011, and seeks review of three orders issued by the Commissioner of Labor (Commissioner or respondent) on February 8, 2011 against petitioner Robert H. Weiss. The Commissioner filed his answer on May 24, 2011.

Upon notice to the parties a hearing was held in this matter on May 2, 2014 and February 11, 2015, in Hicksville, New York, before Devin A. Rice, Associate Counsel to 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, make statements relevant to the issues, and file post-hearing briefs.

The first order to comply with Article 6 (wage order) under review directs compliance with Article 6 and payment to the Commissioner of wages in the amount of \$9,117.30 due and owing to Sandra Murtaugh (\$7,017.30) and Erika D. Taylor (\$2,100.00) for the time period from March 30, 2009 to June 11, 2010, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of \$1,278.33, and assesses a civil penalty in the amount of \$9,117.30, for a total amount due of \$19,512.93.

The second order to comply with Article 6 (vacation pay order) under review directs compliance with Article 6 and payment to the Commissioner for unpaid vacation pay due and owing to Sandra Murtaugh in the amount of \$969.24 for the time period from September 1, 2009 to June 11, 2010, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of \$89.65, and assesses a civil penalty in the amount of \$969.24, for a total amount due of \$2,028.13.

The order under Article 19 (penalty order) assesses a \$500.00 civil penalty against petitioners for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee for the period from on or about April 12, 2009 to June 11, 2010.

The petition alleges the orders are invalid or unreasonable because (1) the claim of Erika D. Taylor was paid in full through settlement of a small claims court action; and (2) the claim of Sandra Murtaugh was paid through settlement for \$5,000.00 of a small claims court action.

The respondent, at the conclusion of the petitioner's presentation, filed a motion to dismiss on the ground that petitioner did not raise certain issues in his petition, and therefore any objection not raised in the petition was waived. We disagree. The petitioner, although not specifically objecting to the vacation pay order and penalty order in his petition, consistently contested the orders throughout this proceeding, including during his opening statements and testimony, by raising the defense that he had paid the wages found due by settling a small claims action. Based on the record, we modify the wage order and vacation pay order to reduce the amounts due, and affirm the penalty order.

SUMMARY OF EVIDENCE

The claims

Claim of Erika D. Taylor

On or about August 18, 2009, Erika D. Taylor filed a claim with the New York State Department of Labor (DOL) alleging she worked as a receptionist for petitioner Robert H. Weiss' law firm from August 8, 2008 to July 8, 2009. She claimed that her agreed rate of pay was \$15.00 an hour, that she earned \$1,200.00 per bi-weekly pay-period, that petitioner reduced her rate of pay to \$11.25 without notice effective the pay period ending April 12, 2009, and that

she is owed the difference between her agreed rate and her reduced rate for the pay periods ending April 12, April 26, May 10, May 24, June 7, June 21, and July 5, 2009, for total of \$2,100.00 in owed wages. Taylor did not testify at the hearing.

Claims of Sandra Murtaugh

On or about June 23, 2010, Sandra Murtaugh filed a claim with DOL alleging petitioner failed to pay her \$1,615.38 for the bi-weekly pay period ending June 4, 2010 (80.25 hours worked), and \$807.69 for the week ending June 11, 2010 (39.5 hours worked).

Also on or about June 23, 2010, Murtaugh filed a claim alleging petitioner owed her six days of accrued vacation pay in the amount of \$969.24 for the period from September 2009 to June 2010. She alleged she had an oral agreement with petitioner when hired that she would receive one week of vacation the first year, two weeks the second year, and three weeks after five years.

Finally, on August 6, 2010, Murtaugh sent correspondence to DOL alleging petitioners withheld 25% of all employees' wages beginning March 30, 2009 as "deferred compensation" and promised to pay it back within six to eight weeks, which was never repaid.

Small Claims Court

Murtaugh filed a complaint against petitioner in small claims court on or about July 30, 2010, seeking to recover unpaid deferred compensation in the amount of \$4,615.40. The case was assigned docket number SC01573/10. The small claims action was settled for \$5,000.00 by mediation agreement on October 21, 2010. The settlement agreement reads that "[p]laintiff received in hand today . . . \$5,000. This is in full and final settlement of all claims." The check paid to Murtaugh has written on it "SC01573/10 only" and is initialed by Peter Kamran, the attorney who represented petitioner at mediation. The check also has a typewritten note that reads "Payment in Full _ Weiss." Murtagh faxed a copy of the settlement to DOL on May 16, 2011, which was after respondent's orders were issued.

Respondent's investigation

Labor Standards Investigator Armando Gonzalez testified generally concerning documents contained in DOL's investigative file, but had no first-hand knowledge of DOL's investigation of petitioner, testifying that the investigators who conducted the investigation were no longer "with the Department." Gonzalez indicated he was aware that both claimants had filed actions in small claims court, which petitioner settled.

Gonzalez explained that based on his review of the investigative file, the purpose of the hearing was to collect any additional wages for Murtaugh that were not included in the small claims settlement. He believes a deferred compensation plan usually involves a written agreement, but can sometimes be oral, and agreed that the only evidence of a deferred compensation plan in this proceeding is the claimants' statements to DOL that one existed.

Gonzalez testified that in assessing a 100% civil penalty against petitioner, DOL considered the size of petitioner's firm, the good faith of the petitioner, his compliance with record-keeping requirements, and the gravity of the violation.

Petitioner's evidence

Testimony of Sandra Murtaugh

Sandra Murtaugh testified petitioner paid her \$1,800.00 every two weeks. She explained that her small claims action for deferred compensation and subsequent settlement was totally separate from the claim she filed with DOL for unpaid wages and vacation. She testified her DOL claim was only for unpaid wages for the last three weeks of her employment at petitioner's law firm and her unpaid accrued vacation based on petitioner's unwritten vacation policy. Murtaugh testified the small claims court settlement was only for deferred compensation.

Testimony of petitioner Robert H. Weiss

Weiss testified no salary deferment program existed. He explained that he cut all salaries by 25% instead of firing employees, because the firm did not have money to pay wages. He testified that "[e]verybody got cut down 25 per cent across the board in order to keep the firm floating and I told them I would pay them back if the firm became profitable which was not the case because the firm went under." According to Weiss, he told the employees "very clearly" that they would only be repaid the "deferred" wages if the firm was profitable. He further explained that some of his employees prepared an agreement for him to sign, which he refused to sign because there was no agreement.

Weiss hired an attorney, Peter Kamran, to handle Murtaugh's small claims court action and authorized him to settle it for \$5,000.00. Weiss believes the settlement was for deferred salary and lost wages, and that he paid her more than the amount she sued him for in order to resolve all claims against him.

Testimony of Peter Kamran

Peter Kamran testified petitioner retained him to settle Murtaugh's small claims court action. Kamran explained that Murtaugh's action was for \$4,615.00 and petitioner settled for \$5,000.00 to "settle everything." Kamran understood the settlement was to cover all claims by Murtaugh against Weiss, although he was "fuzzy on like deferred payment, deferred salary and whatever the other claim was, but it was to settle everything against [petitioner]." Kamran testified he did not know what other claims Murtaugh may have had, presumed Murtaugh and petitioner knew what they were, and that he was unaware of anything involving DOL.

Kamran testified he initialed the settlement check and wrote "only" on it because Jennifer Bailey, who was present with Murtaugh at the time, did not trust the petitioner, and wanted to make sure the settlement was only for Murtaugh's case and not for claims Bailey had filed against petitioner.

Respondent's evidence

Testimony of Jennifer Bailey

Jennifer Bailey worked as an attorney at petitioner's law firm. She testified she was present in small claims court with Murtaugh when that case was settled, and witnessed Murtaugh telling Kamran that the settlement was just for her small claims claim, and did not include the DOL claim, and that Murtaugh repeatedly made this clear.

Bailey testified that because petitioner's firm was having financial difficulties, petitioner reduced everybody's salary and would repay the deferred amounts once petitioner secured financing. The salary reduction was offered as "take it or leave it," and Bailey does not recall that the deferred wages would only be repaid if the firm was profitable. Bailey also testified that she could not remember petitioner's "exact" vacation policy. Bailey received vacation and knows other employees did as well, but she does not know the details for anybody else.

Testimony of Sandra Murtaugh (recalled)

Murtagh testified she worked for petitioner's law firm as a receptionist, and later as petitioner's assistant. She explained again that her small claims action for "deferral" and her claim for wages with DOL were separate. She further testified that when she asked Kamran why petitioner paid more than her claim to settle the small claims court action, Kamran did not know, but told her he assumed the extra money was for her "time and interest."

ANALYSIS

The Board makes the following findings of fact and conclusions of law pursuant to the provision of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39):

Wage Order

The wage order consists of two components: the claim by Sandra Murtaugh and Erika D. Taylor that petitioners owe them "deferred compensation," and Murtaugh's claim for unpaid wages for the last three weeks of her employment. Based on the record, we modify the wage order as follows.

Deferred compensation

Murtaugh and Taylor¹ claimed that they were owed "deferred compensation" for a period of time when their pay rates were reduced. However, we find based on petitioner's credible testimony, supported by an unsigned deferred compensation agreement rejected by petitioner because he "did not agree with it," that there was no agreement to repay employees the difference of their regular wages and reduced wages unless the firm became profitable. Because the promised payment was contingent on the profitability of the petitioner's firm, we find that the "deferred compensation" portion of the wage order is not covered by Article 6 of the Labor Law

¹ Taylor did not testify and the parties appeared to agree at hearing that Taylor's claim for deferred compensation had been settled in small claims court.

as “wages” and revoke that part of the order (*see Matter of Russ D. Gerson et al.*, PR 10-361 at pp. 6-7 [December 17, 2014]).

Unpaid wages

Petitioner did not contest the wages owed to Murtaugh for three weeks he failed to make payroll, instead arguing that he believed he had resolved all claims against him by Murtaugh when he settled her small claims action. We find that respondent’s determination that petitioner failed to pay Murtaugh wages for three weeks (119.75 hours including .25 hours of overtime) is reasonable. Records in evidence show Murtaugh’s pay rate was \$1,615.38 per bi-weekly pay period, which was reduced to \$1,384.61 during the relevant time period. There is no evidence that the agreed salary was for other than 40 hours of work per week, therefore we find Murtaugh’s regular hourly rate during the relevant period was \$17.31 (12 NYCRR 142-2.16), and her overtime rate was \$25.96 (12 NYCRR 142-2.2). Therefore, petitioners owe Murtaugh for 119 hours at her regular hourly rate, which is \$2,068.26, plus ¼ hour of overtime, which is \$6.49, for a total of \$2,074.75.

Weiss argues he does not owe Murtaugh these wages, because he settled “all claims” she had against him in small claims court. The respondent was not a party to the proceeding in small claims court and is not bound by any settlement between Murtaugh and Weiss. Nevertheless, we credit petitioner in this proceeding with the \$5,000.00 payment he made to Murtaugh to settle her small claims action against him (*see e.g. Uniform City Court Act § 1808*). Because the amount of wages due is less than the settlement, we reduce the wages due and owing on the wage order to \$0.00.

Civil Penalties

The respondent included a 100% civil penalty in the wage order, which Investigator Gonzalez testified was determined based on the size of the firm, the good faith of the employer, compliance with record-keeping requirements, and the gravity of the violation. These are all considerations set forth by statute for the Commissioner to consider when determining a civil penalty (Labor Law § 218 [1]). Petitioner did not meet his burden of proof to show the respondent’s considerations were unreasonable. He presented no evidence that he complied with record-keeping requirements, that the gravity of the violation did not warrant a 100 % civil penalty, that he acted in good faith, or other evidence that the penalty was unreasonable or invalid. We affirm imposition of a 100% civil penalty, and reduce the amount to \$2,074.75 consistent with our finding of the amount of wages that were unpaid. Because civil penalties are collected by the state as a function of its law enforcement powers in enforcing the Labor Law, we do not offset the civil penalty with any part of the small claims settlement where the record shows petitioner failed to pay wages in violation of Article 6 of the Labor Law.

Interest

Respondent assessed interest against petitioner at 16% per year to the date of the order as required by Labor Law § 219. However, we find that no interest is due because the settlement of the small claims court action occurred prior to issuance of the order. Because we find the wages due are less than the amount of the settlement, the assessment of interest is unreasonable.

Vacation Pay Order

The vacation pay order finds petitioner owes Murtaugh \$969.24 in unpaid accrued vacation pay. New York does not require employers to provide vacation pay to employees. However, when an employer establishes a paid vacation leave policy, Labor Law § 198-c requires the employer provide this benefit in accordance with the established terms (*Matter of Jay Baranker et al.*, PR 11-115 at p. 5 [October 2, 2013]). Where a policy exists, Labor Law § 195 (5) requires an employer to “notify his employees in writing or by publicly posting the employer’s policy on . . . vacation.” Forfeiture of vacation pay upon termination of employment must be specified in the vacation policy or in an agreement with the employee (*Matter of Marc E. Hochlerin et al.*, PR 08-055 [March 25, 2009]). Forfeiture provisions must be explicit (*Matter of Baranker*, *Supra.*).

No written vacation policy existed. Weiss testified employees could take vacation when they wanted subject to his approval. He further testified he had no policy to pay for accrued vacation time. Murtaugh claimed petitioner verbally promised when he hired her that she would accrue one week of paid vacation the first year of employment, two weeks the second year, and three weeks after five years. She testified that when her employment ended, she had an “allotment” of unused vacation time. We find petitioner’s agreement with Murtaugh was for accrual of vacation days based on her seniority. Because the Labor Law required the policy to be in writing and forfeiture agreements must be explicit, we find respondent’s determination reasonable that vacation pay is due.

Murtaugh claimed petitioners owed her six days of vacation pay at \$161.54 per day. As discussed above, we find Murtaugh’s wage rate was \$17.31 per hour at the time her employment ended, and reduce the vacation pay due to \$830.77.² Also as discussed above, petitioner must be credited the \$5,000.00 he paid to Murtaugh as settlement of the small claims action. Because the unpaid vacation pay and wages together are less than the settlement amount, we reduce the vacation pay due to \$0.00.

Civil Penalties

The respondent included a 100% civil penalty in the vacation pay order, which Investigator Gonzalez testified was determined based on the size of the firm, the good faith of the employer, compliance with record-keeping requirements, and the gravity of the violation. These are all considerations set forth by statute for the Commissioner to consider in determining a civil penalty (Labor Law § 218 [1]). Petitioner did not meet his burden of proof to show the respondent’s considerations were unreasonable. He presented no evidence that he complied with record-keeping requirements, that the gravity of the violation did not warrant a 100 % civil penalty, that he acted in good faith, or other evidence that the penalty was unreasonable or invalid. We affirm imposition of a 100% civil penalty, and reduce the amount to \$830.77 consistent with our finding of the amount of vacation pay owed. Because civil penalties are collected by the state as a function of its law enforcement powers in enforcing the Labor Law, we do not offset the civil penalty with any part of the small claims settlement where the record shows the petitioner violated the Labor Law.

² \$138.46 per day based on the hourly rate of \$17.31 x 8 hours per day.

Interest

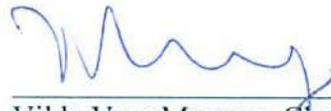
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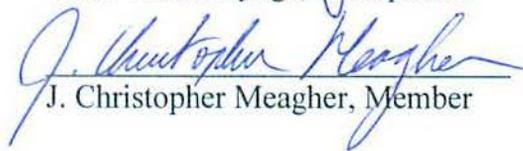
Penalty order

The penalty order assesses a \$500.00 civil penalty against petitioners for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee for the period from on or about April 12, 2009 to June 11, 2010. Petitioner presented no evidence that he complied with the recordkeeping status. The penalty order is affirmed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is modified to reduce the wages due to \$0.00, the civil penalty to \$2,074.75, and interest to \$0.00.
2. The vacation pay order is modified to reduce the wages due to \$0.00, the civil penalty to \$830.77, and interest to \$0.00.
3. The penalty order is affirmed.
4. The petition for review be, and the same hereby is, granted in part and denied in part.



Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member*Absent*

Michael A. Arcuri, Member

Frances P. Abriola, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
June 10, 2015.

Interest

Respondent assessed interest against petitioner at 16% per year to the date of the order as required by Labor Law § 219. However, we find that no interest is due because the settlement of the small claims court action occurred prior to issuance of the order. Because we find the total owed was less than the amount of the settlement, the assessment of interest is unreasonable.

Penalty order

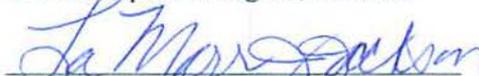
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3. The penalty order is affirmed.
4. The petition for review be, and the same hereby is, granted in part and denied in part.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member



LaMarr J. Jackson, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
June 10, 2015.

Michael A. Arcuri, Member

Frances P. Abriola, Member