STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: JAMES T. METZ III, ALICIA HARDING METZ, LAUREN H. SIMONS, AND GRJH, INC. (T/A COBBLE POND FARMS), Petitioners, To Review Under Section 101 of the New York Labor Law: Two Orders to Comply with Article 6, and an Order Under Article 19 of the Labor Law, all dated May 6, 2014, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 14-120 RESOLUTION OF DECISION

APPEARANCES

Lauren H. Simons, petitioner *pro se* and for James T. Metz III, Alicia Harding Metz, and GRJH, Inc. (t/a Cobble Pond Farms).

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Benjamin T. Garry of counsel), for respondent.

WITNESSES

Lauren Simons, for petitioners.

Elvira O'Rourke, claimant, and Jeremy Kuttruff, Senior Labor Standards Investigator, for respondent.

WHEREAS:

The petition was filed with the Industrial Board of Appeals (Board) on June 13, 2014, and seeks review of three orders issued against petitioners by the Commissioner of the Department of Labor (Commissioner or DOL) on May 6, 2014. On July 28, 2014, the Commissioner filed an answer. Upon notice to the parties, a hearing was held in Albany, New York on November 18, 2014 before Wendell P. Russell, Jr., Counsel to the Board and the

designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements to the and file legal briefs.

The wage order finds that James T. Metz III, Alicia Harding Metz, Lauren H. Simons and GRJH, Inc. (t/a Cobble Pond Farms) (petitioners) were employers as defined in New York Labor Law § 190 (3), having employed Elvira O'Rourke (claimant or O'Rourke) as a manager from September 8, 2013 to October 19, 2013,[1] and failed to pay her wages. The order seeks payment of $1,400.00 in unpaid wages, $141.15 in interest, $350.00 in liquidated damages, and $1,400.00 in civil penalties, for a total due of $3,291.15.

The supplemental wage order finds that petitioners failed to pay claimant supplemental wages for vacation time and seeks payment of $1,400.00 in supplemental wages, $122.13 in interest, $350.00 in liquidated damages, and $1,400.00 in civil penalties, for a total due of $3,272.13.

The penalty order assesses petitioners a civil penalty for one count of failure to keep and/or furnish true and accurate payroll records, for a total due of $500.00.

The petition asserts that petitioners were "not properly served" and that claimant was "not entitled to vacation pay."

SUMMARY OF EVIDENCE

The Wage and Supplemental Wage Claims

On October 4, 2013, O'Rourke filed a claim for unpaid wages in the amount of $1,400.00 for work as a manager at the Cobble Pond Farm convenience store and Sunoco gas station at 3360 Route 9, Valatie, New York (the "Valatie store"), for the period of September 8, 2013 to September 18, 2013, at a pay rate of $700.00 per week. On November 5, 2013, she also filed a claim for unpaid supplemental wages in the amount of $1,400.00 for two weeks of vacation pay.

Testimony of Lauren Simons

Simons testified that on September 18, 2013, she first suspended, and then terminated O'Rourke for falsifying records (employee sign in/sign out sheets). Simons testified that O'Rourke, as the manager of the Valatie store, was a salaried employee earning $700.00 a week, and that there was a "general expectation" that store managers would work 45 hours a week, but a manager's schedule was "not an exact science" and "was really up to the manager." Regarding O'Rourke's schedule in particular, Simons testified that "it varied" and was "entirely up to her."

Simons testified that GRJH, Inc. had a vacation policy, set forth in its "Employment Manual," which permitted employees working "on average at least 35 hours a week" to earn paid vacation time after six months of service, at a rate of 2 paid vacation days after 6 months of

[1] This date appears to be a typographical error as both claim forms indicate that the last day claimant worked was September 18, 2013.

service, 5 paid vacation days after a year of service and 10 paid vacation days after 2 years of service. Simons also testified that the policy required that an employee take earned vacation time "within the year allowed" or the time would be forfeited, and that all earned vacation time would be forfeited if an employee quit or was discharged. Simons testified that the vacation policy was posted at the Valatie store and that she herself gave a copy of the employment manual to O'Rourke and "went over it with" her. Simons also testified that she did not have at the hearing O'Rourke's signed acknowledgement form for the employment manual, but that petitioners did have the signed form "in the main office," and she had simply "neglected to bring it," not believing it would be "necessary."

Simons testified that O'Rourke, because of two years of service, had been entitled to two weeks of vacation, but had been paid for a week of vacation in July 2013, so that she would have been entitled to one week of paid vacation, had she not been terminated. Simons also testified that she did not "know what days [O'Rourke] actually took off, but she was paid for a full week." As proof of this, Simons testified she herself would have authorized O'Rourke's July 2013 vacation, and that the week of vacation pay was reflected on O'Rourke's pay stub. Simons testified that she (Simons) had no time records with her at the hearing, but testified that she had personal knowledge that O'Rourke had taken the week of vacation, recalling that O'Rourke had gone to Lake George with her fiancé.

Simons testified that she had received notice of the prehearing conference and of the hearing itself and that she understood her responsibilities with regard to the burden being on petitioners to produce evidence to overcome the presumption that the orders were reasonable and valid. She also testified that she had not brought to the hearing or provided to DOL at any time prior thereto any of the records requested by DOL prior to the issuance of the order because she "did not see the request [for the records] or did not read the request." Finally, Simons testified that to her knowledge, other than "certified" mail, no mail was received at the Valatie store.

Testimony of Senior Labor Standards Investigator Jeremy Kuttruff

Senior Labor Standards Investigator Jeremy Kuttruff testified that his job duties include investigation of wage and wage supplement claims and that he had investigated O'Rourke's claims. He testified that DOL sent several collection letters to petitioners at the Valatie store, explaining that DOL's "preferable address" is "the address where the work was performed." Kuttruff also testified that DOL had received no notice that that correspondence had been returned to DOL as undeliverable. Kuttruff further testified that it was DOL's practice to send collection letters and correspondence regarding orders to comply to the address where a claimant actually worked and only if such correspondence were returned by the US Postal Service as undeliverable would DOL use an employer's corporate address. Finally, in support of the civil penalties assessed in the orders, Kuttruff testified as to preparation of the "Issuance of Order to Comply Cover Sheet" and the "Labor Law Articles 6, 19 and 19-A Violation Recap" forms, noting that petitioners failed to respond to three DOL notices and to maintain and/or furnish to DOL any required records, and that DOL had determined, after a background search, that this was petitioners' first violation. He testified, with regard to the penalty for the records violation, that DOL "found that the five-hundred-dollar penalty was reasonable and not excessive for a first violation" and, with regard to the civil penalty in the wage order, that "in a case where we are being ignored by an employer, that one hundred percent is very reasonable and also commensurate with the amount of wages found to be owed."

Testimony of Claimant Elvira O'Rourke

Claimant Elvira O'Rourke testified that she had worked at the Valatie store since 2010, when she was hired "off the books" to work as a cashier and was paid in cash on an hourly basis. She testified that in March 2011, when "corporate was taking the store back" from their lessee, she filled out an application, was hired by GRJH, Inc. to work as a cashier from 7:00 AM to 4:30 PM and began receiving paychecks and wage statements. She testified that when GRJH, Inc. hired her, no one explained the terms and conditions of her employment. She further testified that she "was always going over 40" hours per week, seven days a week. If an employee did not show up for work, she "would have to stay and work . . . because it was my responsibility to stay and work . . . I can't just close the store."

She testified that although she had never been instructed to do so, she signed in and out because of the presence of a "visible" sheet that "said sign in and out." She testified that no one ever explained to her the details or ramifications of maintaining a sign in sheet. She also testified that she signed in and out at the same times daily even though her actual hours at work were not reflected on the sheet.

Regarding her job duties, she testified that she found out she had been promoted to manager when her paycheck no longer reflected the number of hours she worked per week and instead was for the same amount week after week. She also testified that she had "absolutely no training" for her job as store manager, that she "learned as [she] went" and that no one explained to her what her duties entailed, even though she was supervising three or more employees. As a manager, she was no longer paid by the hour, but was paid a salary, regardless of the number of hours she worked, making $700.00 a week.

O'Rourke testified Simons gave her the 2013 version of the employment manual, that she had gotten no other version of it. She testified that no one had discussed the manual with her, although she did sign the attached acknowledgement form. She testified that the terms and conditions of employment in the manual applied "more to the employees that [she] managed."

She also testified that on September 18, 2013, she was called into the back office where petitioner Simons told her she was suspended for a $400.00 shortage in cash that had been found at the Valatie store. Prior to her suspension, she testified, no one had even spoken with her, counselled her or mentioned her hours or those of her subordinates, that "[she had] never been written up, [she had] never been late to work, [she had] never not showed up to work." She also testified that "the store was running successfully" as of September 18, 2013, although it was always short staffed. After Simons suspended her, she left work, and that evening, a state trooper called her, "wanting [her] to come in for questioning . . . about $400 missing." When thereafter she did not receive two weekly paychecks, she called the store asking to be paid and was told that the checks were in the mail, although they never arrived. She also was told that she needed to return the store keys in order to be paid, which she did, but was not paid. After approximately one month, she testified, she was arrested for falsifying time records and, although the charges were dismissed, she concluded that she had lost her job.

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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 commissioner 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]); if the Board finds that the order, or any part thereof, is invalid or unreasonable, it shall revoke, amend, or modify it (*Id.*). A petition that challenges the validity or reasonableness of an order issued by the Commissioner shall "state . . . in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101 [2]). Board Rules provide that "[t]he burden of proof of every allegation in a proceeding shall be upon the person asserting it" (12 NYCRR 65.30), and that burden is met by a preponderance of evidence (State Administrative Procedure Act § 306 [1]). Thus, the burden is petitioners' to prove by a preponderance of the evidence that vacation pay is not due and owing, that unpaid wages are not due and owing, and that the penalty order is 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 Did Not Meet Burden to Show Improper Service

In their petition, petitioners stated that they "were not served properly." The petition did not specify what might not have been "served properly" and petitioners cited no authority in support of that statement.

Simons testified that petitioners received the order, the notice of prehearing teleconference, the notice of hearing and respondent's answer. She also testified that it was possible that she "had not read" DOL's correspondence. We credit this testimony. Investigator Kuttruff testified that none of the letters sent by respondent to petitioners at the Valatie store was returned as undeliverable by the US Postal Service. He also testified that DOL considers mail that is not returned as undeliverable to have been delivered, and that it is DOL's policy to send correspondence to a claimant's work site, and only if a DOL letter is returned by the US Postal Service will DOL then use a corporate address. We credit this testimony. We find that petitioners' statement regarding allegedly improper service lacks a basis in law or fact, and does not meet their burden to show by a preponderance of evidence that respondent's order was invalid or unreasonable.

The Supplemental Wage Order Is Revoked

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 must be specified in the employer's vacation policy or in an agreement with the employee (*Matter of 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.*, PR 06-059 [January 28, 2008]; *see also Paroli v Dutchess County*, 292 AD2d 513, 739 NYS2d 202 [2d Dept 2002]).

Petitioners challenged the supplemental wage order on the grounds that "the individual seeking vacation pay [was] not entitled to vacation pay." Simons produced at the hearing a copy of a 9-page document entitled "GRJH, Inc. Employment Manual: Employees" that was effective January 1, 2013. The manual, which was admitted into evidence at the hearing, states, in relevant part, "If you quit or are discharged, you will forfeit any earned vacation time. NO EXCEPTIONS!" Simons testified that she gave O'Rourke a copy of the manual and talked about it with her. O'Rourke testified that she received a copy of the manual and that she acknowledged receiving the manual by signing the accompanying acknowledgment form. We must recognize that the vacation policy was set out in the manual and contains a provision stating that employees who are fired will forfeit vacation time. Given O'Rourke's testimony about having received, and acknowledged receipt of, the manual, which clearly stated that vacation time would be forfeited upon termination, we find that petitioners met their burden in showing that respondent's order for the payment of two weeks of vacation pay was invalid or unreasonable. The supplemental wage order is revoked in its entirety.

The Wage Order Is Affirmed

Petitioners did not challenge the wage order in their petition, and any issues related to that order are thereby waived, pursuant to Labor Law § 101 (2) ("[a]ny objections to the . . . order not raised in such appeal shall be deemed waived").[2] We find, therefore, that the wage order is valid and reasonable in all respects.

The Penalty Order Is Affirmed

Respondent also imposed 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 the claimant. Petitioners did not object to the penalty in their petition; further, petitioners produced no evidence challenging the penalty. Further, the DOL investigator testified that due consideration was given when setting the penalty amount, citing credibly to petitioners' failure to respond to several DOL notices and to produce requisite records and to the fact that this was a first violation. With petitioners having waived any objection and having produced no records, and with respondent having given due consideration to the penalty amount, the Board finds that the computations the Commissioner made in imposing the penalty order are valid and reasonable in every respect.

[2] We note that at the hearing, Simons, a *pro se* petitioner, suggested that the claimant was not owed any wages—even though she had not been paid for the claim period—because she previously had been paid for time she had not been at work. We further note that petitioners submitted no records to show that the claimant either had been paid for the claimed wage period or had not worked some portion of previous periods. As petitioners presented no records, in spite of numerous requests to do so, the Board need not reach the issue of whether Simons' testimony at the hearing might constitute an objection to the order or overcome the waiver; similarly, the Board need not address the notion that an employer can offset owed wages by claiming an undocumented amount of missed work time.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and

2. The supplemental wage order is revoked; and

3. The penalty order is affirmed; and

4. The petition for review be, and the same hereby is, otherwise denied.

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.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and

2. The supplemental wage order is revoked; and

3. The penalty order is affirmed; and

4. The petition for review be, and the same hereby is, otherwise denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Frances P. Abriola, Member

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