STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: HUGH H. MO A/K/A HUGH HA MO AND THE LAW FIRM OF HUGH H. MO P.C., Petitioners, To Review Under Section 101 of the Labor Law: An Order Under Article 19 of the Labor Law, dated May 15, 2017, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 17-105 RESOLUTION OF DECISION

APPEARANCES

Hugh Mo, New York, petitioner pro se, and *Pedro Medina*, New York, for The Law Firm of Hugh H. Mo P.C.

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

WITNESSES

Hugh Mo, for petitioners.

Labor Standards Investigator Maria Zalewska and Supervising Labor Standards Investigator Lety Escobar, for respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals on June 22, 2017, for review of an order issued by respondent Commissioner of Labor against petitioners Hugh H. Mo a/k/a Hugh Ha Mo and the Law Firm of Hugh H. Mo, P.C. Respondent Commissioner of Labor answered the petition on August 2, 2017. Upon notice to the parties a hearing was held on November 28, 2017, in New York, New York, before Vilda Vera Mayuga, Chairperson of the Board at the time, 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 raised in the proceeding.

The order under Article 19 of the Labor Law imposes a $2,500.00 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 from on or about February 1, 2013 through December 31, 2015, and a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages from on or about February 1, 2013 through December 31, 2015. We find, for the reasons set forth below, that the order is invalid.

SUMMARY OF EVIDENCE

Respondent investigated a claim for unpaid overtime wages filed against petitioners by a former employee.[1] As part of respondent's investigation of the claim, Labor Standards Investigator Maria Zalewska visited petitioners' place of business on February 2, 2016, to interview employees and inspect records. Zalewska testified that petitioners' receptionist refused to allow her to enter the premises and instructed her to return later in the day. Petitioner Mo, an attorney, testified that when Zalewska first visited his offices, he was in a meeting with a client and that the office manager was not in the office that day. Mo further testified that he had instructed the receptionist that nobody can enter the office without first making an appointment. Zalweska returned to petitioners' offices later the same afternoon, spoke briefly with petitioner Hugh Mo, and served him with a "notice of revisit," incorrectly dated February 6, 2016, demanding production of records by January 18, 2016, for employees' hours worked and wages received covering the period February 1, 2013 to present. Zalewska testified that upon returning to her office she realized that she had incorrectly completed the notice of revisit and corrected the date of the notice of revisit from February 6 to February 2, and the date for submitting records from January 18 to February 18. Zalewska further testified that she never served the corrected notice of revisit on petitioners.

Mo testified that subsequent to Zalweska's visit to his office, he spoke to her on the phone, and she agreed that he could send certain records pertaining only to the claimant, which he submitted on February 4, 2018, along with a cover letter memorializing his conversation with Zalweska. Respondent did not reply to Mo's letter or make any further demands for additional records.

FINDINGS AND CONCLUSIONS OF LAW

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

Petitioners have the burden to show by a preponderance of evidence that the order is invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law § 101, 103; Board Rule [12 NYCRR] § 65.30; *Matter of RAM Hotels, Inc.*, PR 08-078 at p 24 [Oct. 11, 2011]). Respondent received a claim from a former employee of petitioners that petitioners had failed to properly compensate her for overtime hours. Respondent was unable to substantiate the claim for unpaid wages, but, because of the investigation of the claim, issued the order on review

[1] The claim for unpaid overtime was not substantiated by respondent.

finding petitioners failed to maintain legally required payroll records for all employees and failed to provide wage statements with each payment of wages. The Labor Law requires employers to maintain certain employee records and to make them available to respondent for inspection (Labor Law § 661; 12 NYCRR 142-2.6), and to provide wage statements to employees with each payment of wages (12 NYCRR 142-2.7). Where an employer fails to comply with these recordkeeping requirements, respondent may direct the employer to pay a civil penalty not to exceed $1,000.00 for a first violation (Labor Law § 218 [1]). We find petitioners met their burden of proof to show the order was invalid or unreasonable, because of the credible evidence produced that a demand for records was not properly served by respondent on petitioners.

Respondent's investigator admitted that the "notice of revisit" she served on petitioners on February 2, 2016, was incorrectly dated February 6, 2016, and demanded production of records by January 18, 2016, an impossibility considering that date was prior to the date the notice was served on petitioners. Because respondent never served petitioners with a valid notice of revisit prior to issuing the order, the order is unreasonable and invalid (*see e.g. Matter of Rick Mercendetti et al.,* PR 07-104 [June 18, 2009] [penalty order for failure to maintain records revoked where DOL never directed employer to furnish records]; *Matter of Donald Merriam et al.*, PR 16-085 [September 13, 2017] [penalty order revoked because DOL did not make proper demand for records before issuance of orders]). Furthermore, we note that the order is also unreasonable for assessing a civil penalty in excess of that allowed by statute for a first violation.

NOW, THEREFORE, IT IS HEREBY RESOLVED AND ORDERED THAT:

1. The order under Article 19 is revoked; and

2. The petition for review be, and the same hereby is, granted.

Molly Doherty, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York,
on August 8, 2018.

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