STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
BETTY BYTHEWAY A/K/A ELIZABETH BYTHEWAY AND BYTHEWAY TYPESETTING SERVICES INC.,	
Petitioners,	DOCKET NO. PR 17-109
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law, dated May 18, 2017,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Betty Bytheway, Norwich, for petitioners.

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

WITNESSES

Betty Bytheway, Sheryl D. Rowe and Jean Ann Blackburn, for petitioners.

Senior Labor Standards Investigator Nathan Lazelle for respondent.

WHEREAS:

On June 30, 2017, Betty Bytheway and Bytheway Typesetting Services Inc. filed a petition to review an order to comply with Article 6 of the Labor Law, issued on May 18, 2017, by respondent Commissioner of Labor (Commissioner or DOL) against them. The order to comply with Article 6 (supplemental wage order) directed payment of $1,576.75 in vacation pay due and owing to claimant Kim Hoag for the period from January 1, 2014 to March 15, 2015, together with $549.49 in interest at 16% per annum calculated to the date of the order, 100% liquidated damages in the amount of $1,576.75, and a civil penalty of $788.38, for a total amount due of $4,491.37. Respondent filed an answer to the petition on September 29, 2017. The petition alleges that the claimant was paid for all her earned vacation days during the claim period.

Upon notice to the parties, a hearing was held on March 21, 2018 and April 18, 2018, in Utica, New York before Michael A. Arcuri, Board member 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.

SUMMARY OF EVIDENCE

Testimony of Betty Bytheway

Bytheway was the founder and owner of Bytheway Typesetting Services, Inc. (hereinafter referred to as the "company"). She was in charge of overseeing the payroll and setting the policies and procedures for all the employees at the company.

Bytheway testified that vacation time was accrued with the company on a *pro rata* basis and that the personnel policy for the company documented this. The personnel policy specifically stated, in relevant part:

> "Employees become eligible for 5 paid vacation days after 12 months of employment. After 2 years and up to 7 years, employees will be paid for 10 vacation days. From 7 years to 15 years of employment an employee will receive 3 weeks paid vacation, and from 15 years on they will receive 4 weeks paid vacation."

It further stated, in relevant part, under the heading "New Hires":

> "After 12 months and 24 months of employment, vacation days are prorated based on the month of hire. Thereafter, vacation days are figured on the calendar year."

Bytheway testified that this policy meant an employee would accrue vacation time as the employee worked throughout the year and accrual would occur on a per-month basis. The policy also specifically set forth that an employee cannot carry over any vacation time from the previous year and that the maximum amount of vacation time that an employee could accrue depended on how many years that the employee worked for the company, but it was never more than four weeks. Bytheway testified that the personnel policy didn't define "prorated" but that all the employees understood they would accrue vacation over the course of a year beginning on January 1st of each year. She testified that the way the policy was written was confusing, but everyone understand they had to earn their vacation time throughout the year. Bytheway stated that there were some exceptions made to this rule; however, no exception was made for the claimant.

Bytheway testified that the claimant began working for the company in 1994, and, during the relevant time period, was entitled to earn four weeks of vacation time per year, which was the maximum amount of vacation pay any employee could earn in a year. As the claimant only worked for two months in 2015, Bytheway asserted she only accrued a pro-rated vacation pay for two months instead of for the entire year, which meant she earned 3.34 days of paid vacation. As

company policy did not permit employees to carry over vacation time from one year to the next and vacation time was earned on a *pro rata* basis throughout the year, Bytheway believed that the amount in the claim went beyond what the claimant was entitled to. Bytheway believed that she paid the claimant the vacation pay that she was entitled to when she stopped working for the company.

Testimony of Sheryl Rowe

Sheryl Rowe was the System Manager and Production Manager for the company, requiring her to manage the computers and networks of the company. She also occasionally supervised the claimant and occasionally managed payroll.

Rowe testified that her interpretation of the company's vacation policy was that it accrued on a *pro rata* basis. She also said that no one ever asked her about any details of the policy or how vacation hours were calculated in a calendar year.

Rowe testified that employees of the company would receive a fraction of their vacation time each month throughout the calendar year and that a typical employee's vacation pay would not accrue until the month in which the employee was hired passed. She further stated that an employee was entitled to vacation pay in January if it was carried over from the previous calendar year. Rowe also testified that sometimes employees would still be able to have vacation time as early as the first of January.

Testimony of Jean Ann Blackburn

Jean Ann Blackburn was the Vice President of the company and a business partner of Bytheway. Blackburn testified that her memory for past facts was limited due to a medical condition. Blackburn testified that vacation pay accrued over the course of the calendar year and that the amount of vacation time accrued depended upon the number of days that an employee worked.

Blackburn testified that she did not handle the payroll and was not entirely aware of how it was handled. She stated that she did not know the rate of accrual for vacation time; however, it was her belief that an employee's vacation pay would accrue based upon the amount of time worked throughout the year. She also testified that there were times employees were confused about the accrual of vacation pay despite being given the policy in the employee handbook. Blackburn stated that typically she referred employees confused about the vacation policy to Bytheway.

Testimony of Senior Labor Standards Investigator Nathan Lazelle

Senior Labor Standards Investigator Nathan Lazelle testified that he has worked as an investigator with the Department of Labor for eleven years and he was the investigator assigned to Kim Hoag's claim. Lazelle testified that as part of her initial claim, the claimant requested 169 hours of unpaid vacation time; however, after his investigation he determined that she was entitled to 119 hours because she earned 160 vacation hours in 2015, she was not permitted to carry any

unused vacation hours from 2014 into the next year pursuant to the company policy, and payroll records showed that she had been paid for 41 vacation hours in 2015. Lazelle testified that after reviewing petitioners' vacation policy, it was the DOL's position that all the vacation pay for employees of the company was accrued and/or earned on January 1st of each year because the policy did not clearly state that vacation was earned on a *pro rata* basis. Additionally, Lazelle determined that there was not a forfeiture clause in the personnel policy, so the claimant was entitled to the vacation time that she earned as of January 1st of each year that she had not used or been paid already at the time that her employment ended.

Lazelle testified that he determined that the claimant had earned 160 hours of vacation pay during the claim period and the company had paid her 41 hours of those vacation hours in the 2015 calendar year, leaving a balance of 119 hours of vacation pay that were unpaid that the claimant was entitled to in the amount of $1,576.75. Lazelle also testified that the DOL assessed a 50% civil penalty because this was petitioners' first such offense, petitioners were cooperative, and Lazelle believed that the Labor Law violation was not intentional.

STANDARD OF REVIEW

When a petition for review is filed, the Board reviews whether the Commissioner's order is "valid and reasonable" (Labor Law § 101 [1]). The petition must specify the order "proposed to be reviewed and in what respects it is claimed that the order is invalid or unreasonable. Any objections ... not raised in [the petition] shall be deemed waived" (*Id.* § 101 [2]). The Board is required to presume that an order of the Commissioner is valid (*Id.* § 103). The hearing before the Board is *de novo* (Board Rule 66.1 [c], [12 NYCRR 66.1 (c)] and if the Board finds that the "order, or any part thereof, is invalid or unreasonable, it shall revoke, amend or modify the same" (*Id.* § 101[3]). The burden is on petitioners to prove by a preponderance of the evidence that the order was invalid or unreasonable. (Board Rules [12 NYCRR] 65.30; State Administrative Procedure Act § 306; *Matter of Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

FINDINGS OF FACT AND CONCLUSION OF LAW

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

The Supplemental Wage Order Is Affirmed

Claimant is Owed Vacation Pay

The question before the Board is whether the DOL validly and reasonably concluded that the claimant was entitled to unused vacation pay for the entire calendar year after the termination of her employment, or whether she was entitled only to vacation time earned on a *pro rata* basis for the weeks she actually worked prior to her termination.

New York State does not require employers to provide vacation pay to employees. However, when an employer does provide its employees with paid vacation leave, Article 6 of the Labor Law requires the employer to pay such agreed-upon "benefits or wage supplements" as part of the employee's wages in accordance with the vacation policy's stated terms (Labor Law §§ 190[1] and 198-c [2]). A policy in which vacation pay accrues on a *pro rata* basis is permissible provided such policy explicitly and specifically states that vacation pay is accrued on a *pro rata* basis and the rate at which vacation pay is accrued. (*Matter of Knight Marketing Corporation of New York State*, PR 09-200, at p. 6 [September 9, 2011]). Unless an employer has specific and unambiguous language in its policy, regarding a *pro rata* vacation policy with an appropriate forfeiture provision, a former employee is entitled to all vacation pay for the calendar year at the time of their employment termination. (*id.*)

Petitioners asserted that vacation pay was accrued on a *pro rata* basis throughout each calendar year and since the claimant's employment was terminated in February 2015, she was only entitled to the vacation pay that she had accrued during those two months of work. The personnel policy's only reference to vacation time being earned on a *pro rata* basis is in a section entitled "New Hires" and it is valid and reasonable to interpret the *pro rata* earning policy to only apply to employees during their first two years of employment. The policy also does not state the rate at which vacation pay is accrued. During the hearing, Bytheway admitted that the personnel policy language regarding vacation time being earned on a *pro rata* basis was confusing but she believed that all the employees knew that vacation time was earned this way. Rowe also testified about a policy that vacation time was earned on a *pro rata* basis, when she was questioned with specific examples of how an employee may earn vacation time, her answers were inconsistent and indicated that employees might have a right to use all their vacation time at the beginning of a calendar year. Given the inconsistencies in her testimony, the Board gives it little weight. Blackburn testified that she would refer employees to Bytheway with questions about the vacation accrual policy because she was not sure how it accrued. While all three of petitioners' witnesses concurred that a *pro rata* accrual of vacation pay was used for employees, only Bytheway testified to assuming a substantial role in managing payroll and explaining the Personnel Policy to employees. She testified repeatedly that the clause establishing a *pro rata* basis for accrual of vacation pay was specified in the Personnel Policy under the caption, "New Hires." The policy states in pertinent part that "[a]fter 12 months and 24 months of employment, vacation days are prorated based on the month of hire. Thereafter, vacation days are figured on the calendar year." While there is no question that the language contained within the policy contains the word "prorated," the policy is written in such a way that it only applies to new employees within their first two years of employment. There is no clear and unambiguous language in the policy indicating that the *pro rata* vacation accrual policy also applies to employees who worked for the company for more than two years. The record clearly reflects that the purported *pro rata* vacation accrual policy was not clearly written or understood. The claimant could not know how much vacation pay she had been entitled to and could not have had any understanding of when her vacation time became available to her due to absence of a clear and unambiguous *pro rata* accrual policy for vacation pay and forfeiture clause.

The Board has consistently held that in the absence of a specific, unambiguous provision in the personnel policies stating that vacation pay was earned on a *pro rata* basis or unless there is other evidence that such a policy was communicated to the claimant, a claimant's vacation time is not subject to forfeiture or reduction. (*Matter of Rodney Brayman and Phoenix Beverages MTO,*

LLC and Phoenix Beverages, Inc., PR 15-311, at pp. 10-11 [January 25, 2017]; *Matter of Stephen S. Mills*, PR 14-104, at pp. 11-13 [July 22, 2015]; *Matter of Knight Marketing*, PR 09-200, at p. 6). Here, there is no such specific forfeiture language in the company's Personnel Policy. Moreover, none of petitioners' witnesses, including Bytheway, could point to any specific language or provision in the company's written policy that clearly and unambiguously asserted the requisite forfeiture language. Additionally, there was no testimony or evidence presented by petitioners of any separate agreement with the claimant providing for a specific forfeiture clause.

Therefore, the Board finds that petitioners failed to meet their burden to prove the DOL's issuance of the order was unreasonable or invalid because there was no specific or explicit statement of a *pro rata* basis of accrual for vacation pay nor a legally sufficient vacation pay forfeiture clause in the company's personnel policy. The DOL's determination that petitioners owe the claimant unpaid supplemental vacation wages in the amount of $1,576.75 is affirmed.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-A sets the "maximum rate of interest at sixteen per centum per annum." Petitioners did not present any evidence at the hearing to challenge the interest. We affirm the interest imposed in the supplemental wage order.

The Civil Penalty is Affirmed

The supplemental wage order assessed a 50% civil penalty in the amount of $788.38. Labor Law § 218 (1) provides that when determining an amount of civil penalty to assess against an employer who has violated a provision of Article 6 of the Labor Law, respondent shall give:

> "due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with record-keeping or other non-wage requirements."

Lazelle testified that the petitioners had a good-faith belief their interpretation of the personnel policy was correct, the petitioners did not have any prior matters before the DOL, and the petitioners were cooperative during respondent's investigation. Based on those factors, Lazelle determined a 50% civil penalty was appropriate. The Board affirms the Commissioner's imposition of a 50% civil penalty.

The Liquidated Damages Are Revoked

The order includes liquidated damages in the amount of 100% of the wages owed. Labor Law § 198 (1-a) provides that when any employee is paid less than the wage to which they are entitled, the Commissioner may bring administrative action against the employer to collect such claim, and the employer shall be required to pay the full amount of the underpayment "and unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages. Such damages shall not exceed one hundred percent of the total amount of wages found to be due." The Board finds that petitioners demonstrated a good-faith basis for the underpayment, as evidenced by Bytheway's credible testimony regarding her understanding of the company's personnel policy, as well as the testimony of Lazelle that he believed the petitioners' violation was unintentional. (*See e.g., Matter of Brayman*, PR 15-311, at p. 13. Thus, the Board revokes the liquidated damages imposed in the supplemental wage order.

NOW THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The supplemental wage order is modified to revoke the liquidated damages, and as so modified, is affirmed; and

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

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
October 24, 2018.

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Molly Doherty, Chairperson

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Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Syracuse, New York, on
October 24, 2018.