STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
DEJEAN GATHERS (T/A CAMP VISION SUMMER CAMP INC.),	:	
Petitioner,	:	DOCKET NO. PR 14-239
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law and an Order Under Article 19 of the Labor Law, both dated September 2, 2014,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Harvey A. Herbert, Attorney, New York City, for petitioner.

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

WITNESSES

DeJean Gathers, for petitioner.

Karima Wilson and Senior Labor Standards Investigator Jeremy Kuttruff, for respondent.

WHEREAS:

On October 6, 2014, petitioner DeJean Gathers filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued against DeJean Gathers (T/A Camp Vision Summer Camp Inc) by respondent Commissioner of Labor (Commissioner or DOL) on September 2, 2014. The Commissioner filed an answer on December 4, 2014.

Upon notice to the parties, a hearing was held on February 26, 2015 and continued on March 24, 2015 in New York, New York, before Board Chairperson Vilda Vera Mayuga, the designated hearing officer in this proceeding. The parties were afforded a full opportunity to

present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The Order to Comply with Article 6 (wage order) directs payment to the Commissioner of unpaid wages due and owing to claimant Karima Wilson in the amount of $3,730.00 for the period from May 5, 2012 to July 6, 2012, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $1,288.43, liquidated damages in the amount of $932.50, and a civil penalty of $3,730.00, for a total amount due of $9,680.93.

The Order under Article 19 (penalty order) assesses a $500.00 civil penalty against petitioner for failing to keep and/or furnish true and accurate payroll records for each employee for the period from May 2, 2012 through July 6, 2012.

Petitioner alleges that: (1) claimant was a volunteer and petitioner is therefore not responsible for any wages; and, in the alternative (2) the respondent erred in its calculation of the amount of wages owed.

At the end of petitioner's case, respondent made a motion to dismiss the petition for failure to meet his burden of proof. The hearing officer reserved on the motion. We hereby deny the motion and consider all the evidence submitted by both parties at hearing.

SUMMARY OF EVIDENCE

The Wage Claim

On July 18, 2012, Wilson filed a claim for unpaid wages with DOL's Division of Labor Standards against Camp Vision Summer Camp LLC (Camp Vision). The claim alleges that Wilson was not paid for work performed from May 2, 2012 through July 6, 2012, at a base rate of $10.00 per hour. The claim states that Wilson worked between 21 and 40 hours per week over the claim period, for a total of $3,730.00 due and owing. The claim further alleges that petitioner informed Wilson that she would be paid beginning on July 2, 2012, including back pay. On July 6, 2012, Wilson quit working for petitioner because he declined her request for payment of wages owed for work she had performed.

Testimony of DeJean Gathers, Petitioner

Petitioner DeJean Gathers testified that he was president of Camp Vision, a summer camp meant to provide services to underserved minority communities throughout New York City.

Petitioner met claimant for the first time in early 2012. Gathers testified that the purpose of the meeting was to assess whether claimant "would be a good fit to help move the company forward." Petitioner was interested in finding someone to "operate in an administrative capacity" to assist Gathers in preparing to open Camp Vision, which was slated to open the first week of July 2012. Gathers further testified that he and claimant reached agreement that, during the spring

in the lead up to the camp opening, claimant would help Gathers "to get things planned and organized so that we can all commence working, starting July 2nd when the camp opens."

Petitioner testified that he agreed to pay Wilson $10.00 per hour beginning July 2, 2012, for assistance with "research on planning, implementation, coordinating, you know, travel arrangements for campers, stuff like that. Stuff that dealt with the day-to-day operations of operating the summer camp." In advance of July 2, 2012, claimant attended a series of planning meetings, which petitioner called "Think Tanks." Petitioner testified that claimant attended between six and eight think tanks, which took place at different locations across New York City. During think tanks, claimant would "take notes, talk to employees, [and] get them to sign papers. If there was anything that wasn't in their employee files, she would let them know what was needed." Claimant also sent e-mails in order to "get everything planned" prior to July 2nd. All tasks claimant performed were related to running the summer camp. Petitioner testified that he never promised claimant payment for time spent attending think tanks. He did agree, however, to compensate claimant for transportation and pay for meals during think tanks.

Petitioner testified that the last time he had contact with claimant was at a meeting approximately one week prior to July 2, 2012, at which petitioner presented claimant with the Camp Vision agreement for her to sign. Claimant expressed to petitioner that she could not continue working with Camp Vision because she could not commit to traveling from her home in Long Island City "to Brooklyn, or the Bronx, or wherever the camps were, or wherever we were going to meet at."

Petitioner introduced into evidence the Camp Vision agreement dated May 22, 2012. Petitioner testified that he created the document and that claimant refused to sign it when he presented it to her. Accordingly, claimant never commenced working on or after July 2.

In relevant part, the agreement reads:

> "On Monday, July 2, 2012, you will begin to reshape the lives of many children/youth through our summer camps. . . . As our team's Administrative Assistant (i.e. Executive Administrator), you will oversee every aspect of policy and operation, as it pertains to the Camp Vision Summer Camps brand. You will support the executive staff and Dr. Gathers through administrative tasks and other duties and responsibilities . . . . Your compensation will be a base rate of $10.00/per hour as an administrative assistant . . . . As part of our efforts to get this project off the ground, we will request that you join the team on several occasions for corporate organization, and for planning meetings. We call them 'Think Tanks.'"

Petitioner further testified to a handwritten letter postmarked June 14, 2014, that he wrote to DOL indicating he offered Ms. Wilson employment on May 22, 2012, which she did not accept and instead agreed to volunteer starting May 27, 2012.

Testimony of Karima Wilson, Claimant

Claimant Karima Wilson met petitioner on April 3, 2012, in response to an employment advertisement. Petitioner informed her about the details of the job, she filled out an employment application, completed a test of her typing skills, and gave petitioner a money order for a required background check.

Wilson testified that she signed Camp Vision's employment agreement dated May 22, 2012, where her title and pay rate were set. Wilson worked for petitioner as an administrative assistant attending meetings, making telephone calls, word processing, making arrangements for summer youth workers, ensuring parents made payments, and being "on call" whenever petitioner needed her assistance. She worked 9:00 a.m. to 5:00 p.m. for $10.00 per hour. In addition to attending think tanks, Wilson also performed her duties from home. She further testified that these duties were performed From April through July 2012.

Although Wilson sought payment from petitioner for time worked, she was never paid by him. Petitioner provided no reason for refusing payment and said he would discuss payment with her later which would include back pay. Wilson ceased working for petitioner on July 6, 2012 after she was informed that there would be no summer camp largely due to under enrollment.

Testimony of Jeremy Kuttruff, Senior Labor Standards Investigator

Jeremy Kuttruff testified that he was the assigned investigator for the claim at issue. He mailed several letters to petitioner alerting him of the claim filed by Wilson and requesting payroll records. Petitioner responded on two separate occasions once requesting more time to locate the relevant records and once alleging claimant's status as a volunteer but providing no employment records to substantiate the claim. Having received no records, respondent issued the orders against petitioner on September 2, 2014.

SCOPE OF REVIEW AND BURDEN OF PROOF

An aggrieved party may petition the Board to review the validity and reasonableness of an order issued by the Commissioner (Labor Law § 101 [1]). A petition must state in what respects the order on review is claimed to be invalid or unreasonable and any objections not raised in the petition shall be deemed waived (*Id.* § 101 [2]).

The Labor Law provides that an order of the Commissioner is presumptively valid (*Id.* § 103 [1]). Should the Board find the order or any part thereof invalid or unreasonable, the Board shall revoke, amend, or modify the order (Labor Law § 101 [3]).

The party alleging error bears the burden of proving every allegation in a proceeding (12 NYCRR 65.30; State Administrative Procedure Act § 306 [1]; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]). Therefore, a petitioner must prove that the challenged order is invalid or unreasonable by a preponderance of evidence (Labor Law § 101 [1]; *Matter of Ram Hotels, Inc.*, PR 08-078 at 24 [October 11, 2011]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to Board Rule 65.39 (12 NYCRR 65.39). For reasons set out below, we affirm the Commissioner's orders.

Petitioner Failed to Show that Claimant was a Volunteer Under the Labor Law

Petitioner alleges that pursuant to the Camp Vision agreement, all work performed by claimant was as a volunteer, and thus petitioner owes no wages to claimant for work performed. We disagree.

Article 6 of the Labor Law defines an "employee" as "any person employed for hire by an employer in any employment" (Labor Law § 190 [2]). Employed means "permitted or suffered to work" (Labor Law § 2 [7]). We credit claimant's testimony that she responded to an advertisement for employment, was hired by petitioner, that he offered her a wage rate and job title, and that she performed work for him. Petitioner did not rebut claimant's testimony, and there is no credible evidence in the record that she volunteered her services gratuitously such that she is not entitled to wages under Article 6 (*cf. Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979]). We find petitioner hired claimant and suffered or permitted her to work.

Respondent's Wage Calculations are Affirmed

The Labor Law requires employers to maintain accurate payroll records that include, among other things, employees' daily and weekly hours worked, wage rate, gross and net wages paid, and any allowances claimed as part of the minimum wage (Labor Law § 661; 12 NYCRR 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative at the place of employment and maintain the records for no less than six years (*Id.*).

In the absence of accurate records required by the Labor Law, an employer bears the burden of proving that the disputed wages were paid (Labor Law § 196-a). Where the employer has failed to keep such records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even though the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820–21 [3d Dept 1989]; *Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2010]).

In a proceeding challenging such determination, the employer must come forward with evidence of the "precise" amount of work performed or with evidence to negate the reasonableness of the inferences to be drawn from the employee's evidence (*Anderson v Mt. Clemens Pottery*, 328 US 680, 687–88 [1949]; *Mid-Hudson Pam Corp.*, 156 AD2d at 821). Given the interrelatedness of wages and hours, the same burden shifting applies to wages and requires the employer to prove the "precise wages" paid for that work or to negate the inferences drawn from the employee's credible evidence (*Doo Nam Yang v ACBL Corp.*, 427 F Supp 2d 327, 332 [SDNY 2005]; *Matter of Kong Ming Lee*, PR 10-293 at 16 [April 20, 2014]).

In lieu of adequate payroll records, petitioner disputed the Commissioner's wage calculation based on petitioner's unsubstantiated contention that approximately one-to-two weeks before July 2, 2012, at a think tank where petitioner presented claimant with the Camp Vision agreement for her to sign, claimant refused to sign the document, and thus the hours worked were less than those claimed by Wilson.[1] In the first instance, under the Labor Law, the existence of an employer-employee relationship does not turn on the existence of a writing. Secondly, due to petitioner's shifting and inconsistent testimony, we find his testimony regarding the circumstances of the agreement incredible. The agreement petitioner introduced into evidence is dated May 22, 2012—several weeks earlier than when petitioner testified to presenting it to claimant. Beyond the issue of when petitioner presented the agreement to claimant, petitioner testified that claimant refused to sign the agreement because she could not continue employment with Camp Vision, yet claimant credibly testified that the agreement bears her signature. And despite testifying that claimant ended her work for Camp Vision at the May 22nd think tank, petitioner's later correspondence to DOL states that "[claimant] volunteered with us for several months" after she was offered employment and refused it on May 22, 2012.

By contrast, as discussed above, we find claimant's testimony to be credible and specific. Accordingly, we find the Commissioner's calculation of claimant's hours to be a reasonable approximation as it was based on claimant's written claim submitted to DOL, and the form is consistent with her testimony at hearing.

In the absence of legally sufficient payroll records submitted by petitioner, the Commissioner was entitled to rely on the written claim form and other statements filed by the claimant in this case as the "best available evidence" and draw any approximation of her hours worked and wages owed, even where imprecise (*see Mt. Clements Pottery Co.*, 238 US at 687–88). We find that petitioner failed to overcome that approximation with credible or reliable evidence establishing the precise hours claimant worked or with other evidence showing the Commissioner's calculation to be unreasonable (*see id.*).

Because petitioner has not met his burden, we affirm the Commissioner's wage calculation.

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 (1) sets the "maximum rate of interest" at "sixteen per centum per annum." Petitioner failed to submit evidence at hearing challenging the interest assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 (2).

Liquidated Damages

Labor Law § 198 (1-a) provides that when wages are found to be due, the Commissioner shall assess against the employer the full amount of the underpayment "and an additional amount

[1] It is undisputed that petitioner has not paid claimant for her time worked.

as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law." Such damages shall not exceed 100% of the total amount of wages found to be due (*id.*). Petitioner failed to submit evidence at hearing challenging the liquidated damages assessed in the minimum wage order and the issue is thereby waived pursuant to Labor Law § 101 (2).

Civil Penalty

Labor Law § 218 authorizes the Commissioner to assess civil penalties based upon the wages found owing upon giving "due consideration" to the factors listed in the statute. Petitioner failed to submit evidence at hearing challenging the civil penalties assessed in the minimum wage order and the issue is thereby waived pursuant to Labor Law § 101 (2).

Penalty Order

Labor Law § 661 and 12 NYCRR 142-2.6 require that every employer establish, maintain and preserve for not less than six years, contemporaneous, true, and accurate weekly payroll records and make such records available upon request of the Commissioner at the place of employment. Petitioner failed to submit evidence at hearing challenging the penalty order and the issue is thereby waived pursuant to Labor Law § 101 (2).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and

2. The penalty order is affirmed; and

3. The petition is otherwise denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in Albany, New York, on
July 13, 2016.