STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
DEMAREE J. BARNES AND RUTH WALDEN AND SABA JAMBU AND NEIGHBORHOOD YOUTH & FAMILY SERVICES,	:	
Petitioners,	:	DOCKET NO. PR 12-089
To Review Under Section 101 of the Labor Law: An Order to Comply With Article 6 of the Labor Law, dated January 6, 2012,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Ruth Walden, petitioner pro se, and for Demaree J. Barnes.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Jeffrey G. Shapiro and Paul R. Piccigallo of counsel), for respondent.

WITNESSES

Ruth Walden, Demaree J. Barnes, and Lawrence A. Warden, for petitioners.

Wanda Aska, Labor Standards Investigator Leo Lewkowitz, and Senior Labor Standards Investigator Vincent Hammond, for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on March 9, 2012, and seeks review of an order issued by the Commissioner of Labor (Commissioner or respondent) on January 6, 2012 against petitioners Demaree J. Barnes and Ruth Walden. Saba Jambu and Neighborhood Youth & Family Services were also named by the order. Neighborhood Youth & Family Services did not appeal or otherwise appear in this proceeding, and the Commissioner amended its order to remove Jambu from potential liability. The Commissioner filed an answer to the petition on July 31, 2012.

Upon notice to the parties hearings were held in this matter on June 5, 2013, in New York, New York, before Jeffrey M. Bernbach, Esq., and on November 12, 2014, before Devin A. Rice, Associate Counsel to the Board, as the designated Hearing Officers 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 to file legal briefs.

The order to comply with Article 6 under review directs compliance with Article 6 and payment to the Commissioner for unpaid supplemental wages (vacation pay) due and owing to 14 named claimants for the time period from May 5, 2003 to August 31, 2006 in the amount of $24,355.45, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $20,541.33, and assesses a civil penalty in the amount of $48,710.90, for a total amount due of $93.607.68.

The petitioners allege they were not employers under the Labor Law. For the reasons set forth below we find petitioners were not employers and grant their petition.

SUMMARY OF EVIDENCE

Neighborhood Youth & Family Services (NYFS) was a government funded not-for-profit corporation that provided social services to residents of Bronx, New York. NYFS' programs relevant to this proceeding were funded primarily by New York City Administration for Children's Services (ACS), which contracted with NYFS to provide various preventive services. Petitioner Ruth Walden testified that her involvement with NYFS started in the 1990s as an uncompensated volunteer board member. At some time in 2005, NYFS' executive director, Lizette Tait, relocated to another state to take care of an ill relative, and Walden, who works as a school teacher, was the only board member who had sufficient time in the afternoons to take over as the not-for-profit's administrator in Tait's absence.

Walden testified she was the "acting administrator" until June 2006, at which time ACS cancelled its contract with NYFS, and the agency was forced to shut its doors. Walden described her role during that time as signing documents in order "to keep the agency running," and doing what the executive director needed to have done because she was not present in New York and could no longer do those things. Walden never held meetings with the staff, was not involved in the payroll, had no input with respect to staffing, did not have anything to do with managing the day to day operations of NYFS, and never received any compensation for her work at NYFS.

Walden testified that when ACS notified NYFS that its contract was being cancelled, she and several other board members met with ACS to attempt to keep the agency open, and followed ACS' directions regarding the close out of the agency and transfer of cases to the new service provider contracted by ACS. Walden further testified that ACS prohibited her from speaking to the employees about the shutdown of the agency, and that all communication with employees was done by ACS officials and NYFS chief operating officer, Lawrence A. Warden. Walden explained that NYFS closed on August 31, 2006.

Petitioner Demaree J. Barnes testified he was a volunteer member of NYFS' board and its chairperson during the relevant time period. Barnes had no input into staff issues and was not involved in staff meetings. Barnes testified that in his role as a board member, he became aware

in 2005 or 2006, along with other board members, of issues related to ACS forms and records that NYFS had not properly completed, and that the Board was aware that if they did not "figure out what was going on, [NYFS] would be in jeopardy of losing the contracts." Barnes further testified that members of the board met with ACS to reassure them that things would be done correctly going forward. Barnes was also a signatory to certain of NYFS' bank accounts.

Barnes also testified that he had other fulltime employment and, therefore, did not actually work at NYFS. The managers of the various programs ran the day to day operations of the agency. He explained that "as a board member you were not there, or not expected to be there on a day-to-day, relative to the working hours, because you can't, because you have another job."

Lawrence A. Warden testified he was the chief operating officer for NYFS during the relevant period. He testified he was the person "in charge" when Walden was not available, and that he was one of the primary contacts between NYFS and ACS. Warden further testified that during a meeting with ACS during the close out period, he specifically asked an ACS deputy commissioner "what happens to the accrued vacation and the response they gave . . . was don't worry about it, we'll take care of it." Following this assurance from ACS, Warden informed the board of NYFS that ACS would "take care of it."

Several named claimants filed claims with the New York State Department of Labor (DOL) alleging that when NYFS closed they were owed accrued vacation under NYFS' vacation policy, and that such vacation was not paid. Labor Standards Investigator Leo Lewkowitz and Senior Labor Standards Investigator Vincent Hammond investigated the claims, determined they were valid, and issued an order against the petitioners and NYFS for failing to pay accrued vacation wages when due. Lewkowitz testified he determined petitioners were employers because their names were on NYFS' tax filings for the relevant time period. Hammond testified DOL had been advised by petitioners that they were contractors of ACS, but DOL never contacted ACS to discuss the unpaid accrued vacation.

Wanda Aska testified she worked at NYFS from August 2004 to August 2006 first as an administrative assistant and later as a case planner. She testified NYFS owed her accrued vacation at the time it ceased operations, and that she filed a claim with DOL to recover her unpaid vacation wages. She testified that a meeting was held at NYFS where Walden represented that NYFS was working with ACS and the employees "were going to get [their] vacation." Additionally, Aska received a letter from NYFS dated August 18, 2006, signed by Margaret Edwards, director of human resources, stating that her employment would be terminated on August 31, 2006 because ACS had terminated its contract with NYFS, and advising that "[a] check for any unused accrued vacation will be issued on Tuesday September 11, 2006." No such check was ever issued.

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):

The individual petitioners allege they are not individually liable as employers, which is the sole issue on appeal. We find that petitioners met their burden of proof to establish they were not employers (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30 [petitioners must prove by a preponderance of the evidence that the order is invalid or unreasonable]).

"Employer" as used in Article 6 of the Labor Law means "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]). The federal Fair Labor Standards Act, like the New York Labor Law defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]), and "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir 1999), the Second Circuit Court of Appeals stated that the test used for determining employer status by explaining that:

> "Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).

When applying this test, "no one of the four factors standing alone is dispositive. Instead the 'economic reality' test encompasses the totality of the circumstances, no one of which is exclusive." (*Id.* [internal citations omitted]).

We find petitioner Ruth Walden was not an employer under this test. There is no evidence she personally had the power to hire or fire employees, that she supervised employee work schedules or conditions of employment, determined pay rates, or maintained employment records. Walden's role during the relevant period, which was limited to signing documents necessary to keep the agency running and meeting with ACS officials concerning termination of the contract and closing out the agency does not rise under the totality of the circumstances to the type of operational control necessary to hold her individually liable as an employer (*see Irizarry v Catsimatidis*, 722 F3d 99 [2d Cir 2013] [individual must possess operational control in a manner that relates to employees' employment to be liable as an employer]). The evidence provided by DOL was insufficient to contradict Walden's testimony. The fact that Walden's name appeared on NYFS' tax filings or that she may have attended a meeting with employees to explain the close out of the agency is not enough to establish she was an employer.

We also find that petitioner Demaree J. Barnes was not an employer under Article 6 of the Labor Law. Barnes was involved with the daily operations of NYFS to a far lesser extent than Walden. The record shows Barnes' role was limited to that of a volunteer board member of a not-for-profit corporation. As an individual board member, he had no authority to act on his own with respect to employment matters. Because Barnes had no individual authority over NYFS' employees, he cannot be individually liable as an employer under the Labor Law (*see Crawford v Coram Fire District*, 2015 U.S. Dist. LEXIS 57997 [EDNY 2015]; *Coley v Vanguard Urban Improvement Association, Inc.*, 2014 U.S. Dist. LEXIS 135608 [EDNY 2014]; *see also Prue v Hudson Falls Post No, 574, Inc.*, 2015 U.S. Dist. LEXIS 41280 [NDNY 2014]).

Having found that the petitioners were not employers, and therefore not individually liable under Labor Law Article 6 for the unpaid accrued vacation, we revoke the order with respect to Demaree J. Barnes and Ruth Walden.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order is revoked with respect to Demaree J. Barnes and Ruth Walden;
2. The order is amended to remove Saba Jambu as an employer; and
3. The petition for review be, and the same hereby is, granted.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
September 16, 2015.