STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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| In the Matter of the Petition of: | : | |
| FRANCIS J. PAOLANGELI AND RESE ITHACA LIMITED T/A PAOLANGELI CONTRACTOR, | : | |
| Petitioners, | : | DOCKET NO. PR 18-036 |
| To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 and 19 of the Labor Law, dated July 10, 2018, | : | RESOLUTION OF DECISION |
| - against - | : | |
| THE COMMISSIONER OF LABOR, | : | |
| Respondent. | : | |

**APPEARANCES**

*Coughlin & Gerhart, LLP*, Ithaca (*Dirk A. Galbraith* of counsel), for petitioners.

*Pico P. Ben-Amotz, General Counsel, NYS Department of Labor*, Albany (*Kevin E. Jones* of counsel), for respondent.

**WITNESSES**

Francis Paolangeli and Rebecca Wright, for petitioners.

Labor Standards Investigator Robert Young and claimant Lawrence Craig Ames, for respondent.

**WHEREAS:**

Petitioners Francis J. Paolangeli (hereinafter "Paolangeli") and Rese Ithaca Limited T/A Paolangeli Contractor (hereinafter "Rese Ithaca") filed a petition in this matter on July 19, 2018, pursuant to Labor Law § 101, seeking review of an order issued against them by respondent Commissioner of Labor on July 10, 2018. Respondent filed her answer to the petition on August 27, 2018.

Upon notice to the parties a hearing was held in this matter on December 3, 2018, in Syracuse, New York before Michael Arcuri, Member of the Board, 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.

The order to comply with Article 6 (hereinafter "supplemental wages order") under review directs compliance with Article 6 and payment to respondent for unpaid supplemental wages due to Lawrence Ames in the amount of $2,560.00 for the time period from January 1, 2017 to August 23, 2017, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $325.44, liquidated damages in the amount of $2,560.00, assesses a 50% civil penalty in the amount of $1,280.00, and assesses a separate civil penalty for violations of Labor Law Section 661 and Department of Labor Regulations (12 NYCRR) § 142-2.6 in the amount of $500.00, for a total amount due of $7,225.44.

Petitioners allege that the order is invalid and unreasonable because petitioners fully paid claimant the supplemental wages that were due. The petition further alleges that the liquidated damages and civil penalties assessed in the order should be revoked because petitioners' business is small, petitioners have no history of previous violations and petitioners were cooperative with the respondent during the investigation.

## SUMMARY OF EVIDENCE

### Supplemental Wage Claim

Lawrence Ames (hereinafter "Ames") was employed by petitioners as an estimator from March 29, 2004 to August 23, 2017, when he left his position. Ames alleged that petitioners owed him $2,560.00 in pay for ten days at eight hours per day of unused vacation time that he had accrued by the time that he quit.

### Witness Testimony

*Testimony of Francis Paolangeli*

Paolangeli is the chief executive officer of his construction company, Paolangeli Contractor, and of his union shop, Rese Ithaca. Paolangeli hired Ames in about 2003 or 2004. Paolangeli testified that his recollection was that when he hired Ames, he told him orally that he would receive a week of vacation time after he worked there for a period of time and then it would progress into two weeks or ten days of vacation and three personal or sick days per year. This was never reduced to writing. Paolangeli never told Ames whether unused vacation time would carry over to the next year and he does not know if Ames ever carried unused vacation over from year to year.

Paolangeli testified that Ames took vacation time and went to Montana from the first of the year until January 9, 2017 or somewhere around that date. Ames took additional vacation days in 2017, to deal with a lightning strike on his house or because he would go to visit a friend. Paolangeli did not testify about specific dates for that vacation time or how much vacation time Ames took then.

Paolangeli testified that in about 2015 or 2016, Ames turned in a daily time slip to the office workers when he was at work. If he did not turn in a time slip, they assumed he was taking a vacation day because he was not at work. Paolangeli did not keep track of vacation time. Ames would keep track of how much vacation time he had accrued or left to use, and the office workers

would keep a record of time slips and vacation time used. It did not make a difference if a day off was taken as a vacation, personal or sick day as it was a total of 13 paid days off per year.

*Testimony of Rebecca Faith Wright*

Rebecca Wright (hereinafter "Wright") has worked at Paolangeli Contractor entering data since March 2016. She collects employee time as part of her job. She worked with Ames, who was an estimator and who earned a salary. Wright testified that she had been told by another worker that vacation, personal and sick time must be used by the last day of each year.

When Wright began working for Paolangeli Contractor, she required all of the employees, including Ames, to write down their hours on daily time slips and to submit those time slips to her. She would write up daily time reports that were compiled from time slips that employees gave to her. If Ames was not at work on a given day to turn in a time slip, Wright assumed he was on vacation and would write down on the daily time report that Ames was on vacation. If Ames was actually out sick or on personal time on a day when Wright documented that he was on vacation, Ames could give her a time slip saying that he was sick or using personal time and she would change it but she did not know if he had ever done that. Wright testified that she always wrote down that Ames took vacation time for days that she did not receive a time slip from him. Wright testified that on March 28, 2017, she knew that Ames was out sick, but she wrote down that he took vacation time. Wright also testified that she wrote down that Ames took vacation time on November 12, 2016, which was a Saturday.

Wright maintained daily records that she created of vacation time and personal time that Ames took in 2016 and 2017. The 2016 records were created, in part, from time slips that Ames wrote on and gave to her from April 12, 2016 to December 30, 2016. The information in the daily records for the dates January 4, 2016 to April 11, 2016, were created by Wright and based on time slips with another employee's name, Dan Dockstater, but which had Ames's time in the office as documented by Michael Paolangeli, another employee, or a bookkeeper named Lisa. According to those records, Ames took 112 hours of vacation time and 33 hours of sick time in 2016. The records show that Ames took 104 hours of vacation time and 7 hours of sick time in 2017. There were no records showing accrued vacation, personal or sick time prior to 2016. Wright had no knowledge about whether Ames's had any vacation, personal or sick time that he had earned but not used prior to when she commenced her employment for petitioners in March 2016. Petitioners had no mechanism in place to track paid leave time for employees prior to the system that Wright implemented after she began working for petitioners. Wright testified that Paolangeli trusts that his employees are honest about their vacation, personal and sick time.

Payroll register records for the pay period ending January 3, 2016 through the pay period ending August 20, 2017 include Ames but do not reflect hours or days that he worked. The payroll register record for the pay period ending August 27, 2017 indicate that Ames worked 24 hours.

*Testimony of Labor Standards Investigator Robert Young*

Robert Young (hereinafter "Young") is a Labor Standards Investigator. Young testified that DOL assessed a 50% civil penalty because the employer showed good faith. He testified that the standard starting point for a civil penalty is 50% and it goes up to 100% if there was a prior labor law violation case, or up to 200% if there are multiple prior cases.

*Testimony of Claimant Lawrence Craig Ames*

Ames worked for petitioners from March 29, 2004 until August 23, 2017 as an estimator. Ames was hired during his second meeting with Paolangeli. Ames testified that during the second meeting, Paolangeli told Ames that he would receive one week of vacation. Ames told Paolangeli that one week of vacation time was not enough and that he would not do the job for any less than two weeks of vacation time. Paolangeli agreed and hired Ames. There was never any discussion about a policy regarding vacation, personal or sick time. There was no employee manual. Ames was never told how much personal or sick time he was allowed to take. Personal and sick time were at the discretion of Paolangeli. If Ames needed personal time off or sick time, he would ask Paolangeli. Ames had always received approval for personal or sick time, and he was never told that he had to use vacation time if he was out for what he thought was personal or sick leave. Ames believed that he had to request vacation time off in advance but that he would call the office to ask for the personal or sick time as needed unless he knew in advance that he had to take a personal or sick day.

Ames tried to track his vacation, personal and sick time each year because petitioners did not track that information for him. Ames used the information that he tracked in various documents to put together one spread sheet prior to the hearing. Generally, Ames agreed with petitioners' contention about the number of days that he took off in 2016 and 2017 but Ames testified that he had a lot of unused accrued paid time off, which petitioners are not reflecting in their records. Ames filed his claim for 10 days of vacation because he believed he had accrued at least two weeks of vacation in reserve, as he was usually "at least two - - two weeks a year behind" in using his vacation. On the May 27, 2016 time slip that Ames turned into Wright, Ames wrote that he was using his last day of vacation for the employment year ending date March 29, 2015.Ames testified that if he needed to take personal or sick time, he would call the office to let the office know. Ames would request vacation time off in advance. Ames did take four days off for vacation to travel to Montana in January 2017.

Ames was paid a weekly salary until some point in 2016, after someone from the Department of Labor visited the workplace. After that he started being paid $32.00 per hour but he was always paid the same salary each week as though he always worked 40 hours per week. Some weeks he worked more than 40 hours but his pay never changed.

## STANDARD OF REVIEW AND BURDEN OF PROOF

Petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101 and 103; Industrial Board of Appeals Rules of Procedure and Practice (hereinafter "Board Rules") [12 NYCRR] § 65.30; *Matter of Angello v. National. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24 [Oct. 11, 2011]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (Labor Law § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*id.* § 103 [1]). The hearing before the Board is *de novo* and if the Board finds that the "order or any part thereof, is invalid or unreasonable, it shall revoke, amend or modify the same" (Board Rules [12 NYCRR] § 66.1 [c]; Labor Law § 101[3]).

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

### Petitioners Failed to Maintain Required Records

Article 19 of the Labor Law requires employers to maintain, for six years, certain records of the hours their employees worked and the wages they paid them (Labor Law § 661). The records must show for each employee, among other things, the rate of pay and basis thereof, the number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, and allowances, if any . . . and "such other information as the commissioner deems material and necessary" (*id.*). Employers must keep such records open for inspection by the Commissioner or a designated representative or face issuance of a penalty (Labor Law §§ 661 and 662 [2]). Article 6 of the Labor Law requires the employer to pay such agreed-upon "benefits or wage supplements" as part of wages (Labor Law §§ 190 [1] and 198-c [2]; *Matter of Stephen S. Mills and the New York Hospital Medical Center of Queens*, Docket No. PR 14-104, at p. 11 [July 22, 2015]). An employer must give employees written notification of or publicly post the employer's vacation policy (Labor Law § 195 [5]).

The record indicates that respondent requested records of petitioners' paid vacation time policy and that petitioners never produced legally sufficient records to respondent during respondent's investigation. It is undisputed that petitioners did not write or post their vacation policy. Both Ames and Paolangeli testified that Ames's terms of employment were negotiated verbally in 2004 and were never reduced to writing. There was also no evidence that petitioners ever even told Ames about their policy for how and when he earned vacation time. While petitioners did provide some payroll records to respondent during the investigation and then entered such payroll records into evidence at the hearing, the payroll records did not contain all of the information required to be kept by Labor Law § 661. The payroll records for Ames do not include actual daily or weekly hours worked or the hourly rate of pay. Additionally, the daily time slips entered at the hearing were insufficient to show compliance with the record-keeping requirement of the law. Petitioners did have daily time slips for the claim period for Ames, but those records, per Wright's testimony, contained errors and are not sufficiently reliable. Wright admitted documenting that Ames was on vacation when he had actually called in sick on at least one occasion. Wright also documented that Ames was on vacation on a Saturday but admitted that was an error because Ames did not work Saturdays. Wright also testified that if she did not receive a time slip from Ames, she just assumed he was taking a vacation day and marked him down as such for the day. Therefore, we find petitioners failed to maintain required vacation policy and payroll records as required by Articles 6 and 19 of the Labor Law.

### The Supplemental Wages Order Is Affirmed

In the absence of accurate records reflecting vacation time earned and vacation time used, an employer bears the burden of proving that the disputed supplemental wages were paid (Labor Law §§ 190 [1] and 196-a). The Commissioner may draw reasonable inferences and calculate unpaid leave based on the "best available evidence" drawn from employee statements or other evidence, even though the results may be approximate (*Matter of Stephen S. Mills and the New York Hospital Medical Center of Queens*, Docket No. PR 14-104, at p. 11 citing *Matter of*

*Marchionda v Indus. Bd. of Appeals of State of N.Y.*, 119 AD3d 1342 [4th Dept 2014]; *see generally Matter of Baudo v New York State Indus. Bd. of Appeals*, 154 AD3d 535, 536 [1st Dept 2017]; *Matter of Ramirez v Commissioner of Labor of State of N.Y.*, 110 AD3d 901, 901-902, [2d Dept 2013]; *Matter of Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378, 379 [2d Dept 1996] citing *Matter of Mid Hudson Pam Corp. v Harnett*, 156 AD2d 818, 820-821 [3d Dept 1989]). In such circumstances, petitioners have the burden of showing that the Commissioner's order is invalid or unreasonable using specific and precise evidence. (*Matter of Joseph Baglio and the Club at Windham*, Docket No. PR 11-394, at p. 7 [December 9, 2015]; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24).

As discussed above, an employer must give employees written notification of or publicly post the employer's vacation policy and any forfeiture provisions must be specified in an employment agreement, and be explicit (Labor Law § 195 [5]; *see Matter of Marc E. Hochlerin and Ace Audio Video, Inc.*, Docket No. PR 08-055, at pp. 4-5 [March 25, 2009]; *Matter of Center for Financial Planning Inc.*, Docket No. PR 06-059, at p. 6 [January 28, 2008]; *see also Gennes v Yellow Book of N.Y., Inc.*, 23 AD3d 520, 522 [2d Dept 2005]; *Paroli v Dutchess County*, 292 AD2d 513, 514 [2d Dept 2002]). Without such written or published policy, the Commissioner may rely on evidence of business practice to determine how an employee accrues vacation time (*Matter of Steven Marchionda and International Group, LLC*, Docket No. PR 10-034, at p. 5 [July 25, 2013] *affd Marchionda*, 119 AD3d at 1342).

It is undisputed that petitioners did not have a written policy regarding paid time off, including vacation, personal or sick time. Both Ames and Paolangeli testified that Ames's terms of employment were negotiated verbally in 2004 and were never reduced to writing. There was also no evidence that petitioners ever told Ames about their policy for how and when he earned vacation time. Moreover, testimony and documentary evidence introduced at hearing supports a finding to the contrary. Ames credibly testified that he was always permitted to carry over his unused vacation days from year to year. Ames's testimony on this point was corroborated by Wright's testimony that Ames himself had written on the timeslip for May 27, 2016, "[l]ast day of vacation for year ending 3/29/15." There was no evidence that petitioners did anything to disabuse Ames of his notion that he used his last day of accrued vacation time through March 29, 2015 on May 27, 2016. Ames also credibly testified that no one ever objected to him taking vacation, personal or sick leave or told him that he did not have any personal or sick time left. Accordingly, we find that petitioners did not have a specified vacation forfeiture policy and, thus, Ames was entitled to be paid for any unused vacation time remaining when he stopped working for petitioners.

With respect to the amount of unused vacation time Ames had accrued prior to ending his employment, Paolangeli's testimony was too general and conclusory to overcome the presumption favoring the Commissioner's order and to meet petitioners' burden. The Board has repeatedly held that general, conclusory and incomplete testimony is insufficient to satisfy the high burden of precision required to meet an employer's burden of proof in the absence of required records (*Matter of Frank Lobosco and 1378 Coffee, Inc.*, Docket No. PR 15-287, at p. 6 [May 3, 2017] citing *Matter of Young Hee Oh*, Docket No. PR 11-017, at p. 12 [May 22, 2014] [employer cannot shift its burden to DOL with arguments, conjecture, or incomplete, general, and conclusory testimony]).

Wright testified, that based on petitioners' records, Ames took 112 hours of vacation time and 33 hours of sick time in 2016 and 104 hours of vacation time and 7 hours of sick time in 2017,

an amount in excess of vacation, personal or sick time earned by Ames in both years. Wright's testimony was specific about how she maintained records, however, she had no knowledge about the terms of Ames's employment since he began working for petitioners and about how much accrued, unused vacation time Ames had when Wright began her employment. Additionally, Wright admitted that her records were not entirely accurate because she incorrectly recorded a sick day as a vacation day, and she charged a vacation day on a Saturday even though Ames did not work on Saturdays. Petitioners did not keep any records showing vacation time earned and used during the entire course of Ames' employment and only entered records for less than the final two years of his employment. Notably, petitioners' payroll records did not include earned leave time or used leave time as they simply paid Ames the same salary every week of the year.

Ames, on the other hand, credibly testified that he had taken minimal vacation time in his first year of employment so that he built up vacation time accruals that continued throughout his employment. Petitioners failed to rebut Ames's testimony as they had no record of Ames earned or used vacation, personal or sick time prior to 2016, when Wright commenced her employment. We find Ames's testimony was credible because it was specific but also because it was supported by petitioners' records entered at hearing, specifically with respect to the May 27, 2016 timeslip, which supports a finding that Ames's unused leave time rolled over to subsequent years and that Ames possessed a reserve of accrued, unused leave. Ames also credibly testified that those time slips did not accurately reflect his hours worked because petitioners continued to treat him as an employee with a weekly salary and the time slips were always for 8-hour periods even when he worked more hours. Wright's records generally did not reflect that Ames was being paid by the hour as Ames's pay check was for the exact same amount each week. Accordingly, we find that petitioners failed to meet their burden to prove that the vacation pay owed to Ames included in the order to comply was incorrect as the record supports a finding that Ames was permitted to and did in fact carryover unused leave time, petitioners records covered less than the last two years of Ames's employment, and those records contained errors.

The Commissioner was entitled to use the best available evidence as a basis for her calculation of underpayment (*Matter of Stephen S. Mills and the New York Hospital Medical Center of Queens*, Docket No. PR 14-104, at p. 11 citing *Marchionda*, 119 AD3d at 1342; *see generally Matter of Baudo v New York State Indus. Bd. of Appeals*, 154 AD3d at 536; *Ramirez v Commissioner of Labor*, 110 AD3d at 901; *Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d at 378 citing *Mid Hudson Pam Corp.*, 156 AD2d at 820-821). Here, we find that the best available evidence was contained in Ames's claim form as supported by Ames's testimony at hearing regarding his approximation of the amount of leave owed and by petitioners' May 27, 2016 timeslip which evidenced that Ames possessed a reserve of unused but accrued vacation days. We affirm the supplemental wages order.

## Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, the order directing payment of those wages shall include "interest at the rate of interest 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." Here, respondent correctly determined that Ames was not paid all supplemental wages owed and petitioners did not offer any evidence to challenge the imposition of interest. As such, we affirm the interest in the order.

Liquidated Damages

Labor Law § 218 provides that when wages are found to be due, respondent shall assess against the employer the full amount of the underpayment or unpaid wages and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment or nonpayment of wages was in compliance with the law. Here, respondent correctly determined that Ames was not paid all supplemental wages due and petitioners failed to offer any evidence challenging the imposition of liquidated damages. As such, we affirm the liquidated damages in the order.

The Civil Penalty is Revoked

The supplemental wages order includes a 50% civil penalty. 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."

Petitioners challenged the civil penalty in the petition because petitioners' business is small, petitioners have no history of previous violations and petitioners were cooperative with the respondent during the investigation and, at the hearing, asserted that they believed they had paid Ames for all of his accrued vacation pay. Young testified that petitioners showed good faith and, otherwise, offered no specific evidence of the factors that must be considered in assessing civil penalties. If the only factor considered was whether or not petitioners showed good faith and Young testified that petitioners did show good faith, there is nothing in the record to support the imposition of the 50% civil penalties.[1] As such, we revoke the 50% civil penalty in the order.

Labor Law § 661 Penalty

The order includes a $500.00 civil penalty for violation Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 142-2.6 by failing to keep and/or furnish for inspection a true and accurate record for each employee, showing daily and weekly hours worked, gross wages, deductions, any allowances claimed and net wages, and all other records required for each employee for the period January 1, 2017 through August 23, 2017. Labor Law § 218 (1) provides

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[1] While respondent entered a three-page document titled Order to Comply Referral at hearing, it is insufficient for respondent to simply state or otherwise list the statutory factors with no explanation of their relevance. (*Matter of Benjamin G. Abraham*, Docket No. PR 18-012, at p. 8 [May 29, 2019] ["[Respondent's investigator's] scant testimony, and the supporting documentation entered at hearing, fails to provide a coherent, relevant explanation regarding the information respondent gathered during its investigation relevant to the four statutory factors and how the respondent applied that information, once gathered, to the statutory factors, i.e., how respondent calculated or otherwise reached the 50% civil penalty."]; *Matter of Charles Allen and Charosa Foundation Corporation,* Docket No. PR 15-063, at p. 10 [September 14, 2016] ["[The Board does] not believe that simply stating the statutory factors with no explanation of their relevance is sufficient."].

that where a violation involves "a reason other than the employer's failure to pay wages," the amount shall not exceed $1,000.00 for a first violation.

Article 19 of the Labor Law requires employers to maintain, for six years, certain records of the hours their employees worked and the wages they paid them (Labor Law § 661). The records must show for each employee, among other things, the rate of pay and basis thereof, the number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, and allowances, if any . . . and "such other information as the commissioner deems material and necessary" (*id.*). Employers must keep such records open for inspection by the Commissioner or a designated representative or face issuance of a penalty (Labor Law §§ 661 and 662 [2]).

As discussed above, petitioners' lack of a documented vacation policy, payroll records that do not reflect actual hour works and hourly rate of pay and daily time slips entered at the hearing were insufficient to show compliance with the record-keeping requirement of the law. As such, we affirm the $500.00 penalty order included in the order to comply.

**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:**

1. The supplemental wage order, interest and liquidated damages are affirmed;

2. The 50% civil penalty in the supplemental wage order is revoked;

3. The Labor Law § 661 penalty is affirmed; and,

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

Molly Doherty, Chairperson
New York, New York

Patricia Kakalec, Member
New York, New York

Michael A. Arcuri, Member
Utica, New York

Najah Farley, Member
New York, New York

Gloribelle J. Perez, Member
New York, New York

Dated and signed by the Members
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