STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: KENNETH PIERI, Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6, and an Order Under Article 19 of the Labor Law, both dated March 10, 2015, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 15–151 RESOLUTION OF DECISION

APPEARANCES

The Law Office of Gary R. Ebersole, Grand Island (*Gary R. Ebersole* of counsel), for petitioner.

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

WITNESSES

Petitioner Kenneth Pieri, for petitioner.

Senior Labor Standards Investigator Joseph Ryan, for respondent.

WHEREAS:

On May 11, 2015, petitioner Kenneth Pieri filed a petition with the Industrial Board of Appeals seeking review of two orders issued by respondent Commissioner of Labor on March 10, 2015, against Kenneth Pieri, David McLeod, and Realty Evictions and Tenanting, LLC.[1] The Commissioner answered on July 20, 2015.

Upon notice to the parties, a hearing was held on December 17, 2015, in Buffalo, New York, before LaMarr J. Jackson, then Member of the Board, and 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.

[1] Petitioner Pieri appears before the Board solely on behalf of himself.

The order to comply with Article 6 of the Labor Law (wage order) directs payment of wages due and owing to claimant Youleidy Vega in the amount of $1,262.10 for the period from December 16, 2013, to January 23, 2014. The wage order assesses interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $227.39, 25% liquidated damages in the amount of $315.52, and a 100% civil penalty in the amount of $1,262.10. The total amount due is $3,067.11.

The order under Article 19 of the Labor Law (penalty order) assesses a civil penalty in the amount of $500.00 for violation of Labor Law § 661 and the Minimum Wage Order for the Miscellaneous Industries and Occupations (12 NYCRR 142-2.6) by failing to keep and / or furnish true and accurate payroll records for each employee from December 16, 2013, through January 23, 2014.

The petition contends that the orders under review are unreasonable because petitioner does not qualify as a statutory employer under the Labor Law. As discussed below, we revoke the wage and penalty orders as unreasonable.

SUMMARY OF EVIDENCE

Testimony of Petitioner Kenneth Pieri

Petitioner Kenneth Pieri testified that he manages Peace Bridge Apartments, a residential building in Buffalo, New York. The building also houses several offices in its basement, including the office out of which Pieri manages the building. Pieri's duties include reviewing applications from potential tenants and ensuring the building is in operating condition.

In 2013 and 2014, Realty Evictions and Tenanting, LLC, a "collection agency," rented an office in the basement of Peace Bridge. David McLeod, with whom Pieri had a personal relationship prior to him renting office space at Peace Bridge, operated Realty Evictions. Pieri was never on Realty Evictions' payroll. He did not provide any management or supervision for McLeod or Realty Evictions. Pieri did not buy or sell anything for or on behalf of McLeod or Realty Evictions. Pieri did not represent himself to any person or entity as an owner, agent, or employee of Realty Evictions. Other than "tak[ing] care of the property," such as replacing a light bulb, Pieri did not provide any work, labor, or services for McLeod or Realty Evictions. Pieri did not hold a key to Realty Evictions' office.

During Realty Evictions' tenancy, Pieri and claimant would encounter one another while "crossing to go to the men's room or ladies room, that's about it, hello, good-bye." Pieri could not recall the substance of their conversations, but he never—either in writing or orally—ordered claimant to do anything related to his work. Given that all mail was delivered to the same spot, Pieri would sometimes deliver to claimant or McLeod mail for Realty Evictions, and vice versa. Pieri never gave claimant cash of any kind.

In 2013, McLeod approached Pieri because McLeod was "short on money" and asked if Pieri could "help [McLeod] out with Miss Vega" by paying to her wages that McLeod owed her. Pieri did not personally owe claimant money; he understood that Realty Evictions owed her money. As a favor to McLeod, who was a friend, Pieri had his secretary issue a check to claimant

for $186.00 from his business account, which was maintained by First Niagara Bank. Pieri understood this to be a loan to McLeod, who was to pay the money back to Pieri. Pieri wrote no other checks to McLeod's employees, though there were other occasions on which Pieri loaned money directly to McLeod, none of which related to Pieri being involved with Realty Evictions.

Testimony of Senior Labor Standards Investigator Joseph Ryan

Joseph Ryan testified that he is a senior labor standards investigator with the DOL and was assigned to investigate the instant claim. Ryan verified that Vega filed a claim for unpaid wages with respondent by mail. The claim form states that Pieri and McLeod were the "Owners/Supervisors" of the Realty Evictions. It also names both Pieri and McLeod as the "superintendent, manager or foreman" of the employer and names First Niagara as the employer's bank. The claim form also states: "David McLeod told me via text and phone calls various times that he was going to pay me as soon as he got the money and his personal situation improved."

Ryan testified that on December 18, 2014, Pieri called Ryan and stated that McLeod owed Pieri over $66,000.00, and that Pieri was not a partner of the Realty Evictions' limited liability corporation. Ryan acknowledged not knowing what proportion of the $66,000.00 related to wages. Pieri told Ryan that Pieri had paid claimant's wages, but he did so as a loan to Realty Evictions. Ryan asked Pieri why he had paid McLeod's employees' wages, to which Pieri replied that he wanted "to help Mr. McLeod out." Ryan reached his determination that Pieri was an employer based on Pieri's statements and information contained in claimant's claim form. Ryan testified that the only contact he had with claimant during respondent's investigation of her claim was when she called on December 15, 2014, to inquire about the status of her claim.

SCOPE OF REVIEW AND BURDEN OF PROOF

The Labor Law provides that an order of the Commissioner is presumed valid (Labor Law § 103 [1]). The hearing before the Board is original in nature (Board Rules of Procedure and Practice [Board Rules] [12 NYCRR] § 66.1 [c]). The party alleging error bears the burden of proving every allegation in a proceeding (State Administrative Procedure Act (SAPA) § 306 [1]; Board Rules (12 NYCRR) § 65.30; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]). 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]). Should the Board find the order or any part thereof invalid or unreasonable, the Board must revoke, amend, or modify the order (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 Board Rule (12 NYCRR) § 65.39. Petitioner has met his burden of establishing that the orders are unreasonable. As discussed below, we revoke the orders with respect to petitioner in their entirety and grant the petition for review.

The Orders are Revoked with Respect to Petitioner

Petitioner contends that the orders are unreasonable because at no time relevant to the claim period was petitioner claimant's employer under Articles 6 and 19 of the Labor Law. We agree.

"Employer" as used in Article 6 and 19 of the Labor Law means "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190; *see also id.* § 651 [6] [similar definition]). "Employed" means that a person is "permitted or suffered to work" (*id.* § 2 [7]). Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) 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 Labor Law is the same test for analyzing employer status under the FLSA (*Matter of Yick Wing Chan v. N.Y. State Indus. Bd. of Appeals*, 120 AD3d 1120 [1st Dept 2014]; *Chung v. New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 318 n6 [SDNY 2003]).

In *Herman v. RSR Security Services Ltd.*, (172 F3d 132, 139 [2d Cir 1999]), the Second Circuit Court of Appeals explained the "economic reality test" used for determining employer status:

> [T]he 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 the 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).

No one of these factors is dispositive; the purpose of examining them is to determine the economic reality based on a "totality of circumstances" (*id.*). Under the economic reality test, employer status "does not require continuous monitoring of employees, looking over their shoulders at all times, or absolute control of one's employees. Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control do not diminish the significance of its existence" (*id.* at 139 [internal quotation marks omitted]). Under the broad New York and FLSA definitions, it is well settled that more than one entity or person can be found to be a worker's employer (*id.*; *Matter of Minkel*, PR 08-158 at 8 [January 27, 2010]).

Petitioner credibly testified that he manages Peace Bridge, including making repairs and reviewing applications from prospective tenants. Petitioner maintained an office in the building's basement, which also housed the office rented by Realty Evictions, a separate enterprise from petitioner's. While petitioner had a preexisting relationship with McLeod, petitioner credibly testified that he was never on Realty Eviction's payroll, did not provide any management or supervision for McLeod, buy or sell anything for or on behalf of McLeod or Realty Evictions, or have access to Realty Evictions' offices. Petitioner did not hold himself out as associated in any way with McLeod or Realty Evictions. Other than managing the physical upkeep of Peace Bridge, and, by extension, conducting repairs to Realty Evictions' office space when needed, petitioner

credibly testified that he provided to Realty Evictions or McLeod no work, labor, or services. Petitioner further credibly testified that he would encounter claimant in passing, including to exchange mail, and he never instructed claimant on how to perform her duties or anything else business related. On a single occasion, as a favor to McLeod, who was "short on money," and on the condition that McLeod would repay petitioner, petitioner issued a check to claimant in the amount of $186.00. Although petitioner loaned McLeod other monies, petitioner credibly testified that he wrote no other checks directly to McLeod's employees or to McLeod for any reason relating to petitioner and McLeod conducting business together.

The burden going forward thereby shifts to the Commissioner to submit sufficient evidence establishing that petitioner possessed the requisite authority over claimant's employment such that he may be deemed an individual employer under the Labor Law. The Commissioner failed to meet her burden. Claimant's identification of petitioner as a responsible party on the claim form is undermined by claimant's narrative description on the claim form, which states: "*David McLeod* told me via text and phone calls various times that he was going to pay me as soon as he got the money and his personal situation improved," (emphasis added). Without more, claimant's statements in her claim form that petitioner was a supervisor, manager, foreman, or owner are insufficient to rebut petitioner's evidence to the contrary (*see Matter of Wong*, PR 12-090 at 9 [October 26, 2016]; *Matter of Arvelo*, PR 15-171 at 11 [May 25, 2016]; *Matter of Franbilt*, PR 07-019 at 5 [July 30, 2008]). The fact that the claim form states that the employer banked with First Niagara supports petitioner's testimony that the check he issued to claimant was from First Niagara, but it alone or in combination with the claim form's identification of petitioner as an employer, does little to establish that petitioner possessed the requisite control over the day-to-day operations of the Realty Evictions to find him individually liable as an employer for the unpaid wages (*see e.g.*, *Matter of Gatanas*, PR 13-126 at 6 [March 2, 2016] [finding no individual liability due to insufficient "operational control" where petitioner directed employees to carry out tasks related to customer service, was sometimes present at the business, and where employees believed petitioner to be the owner or boss]).

We reject respondent's argument that petitioner, having "stepp[ed] in[to] the shoes of the employer," admitted owing claimant wages for time worked. That petitioner called investigator Ryan and stated that McLeod owed Pieri over $66,000.00 cannot be reasonably understood as an admission on petitioner's part that he employed claimant or other employees associated with McLeod or Realty Evictions. By contrast, petitioner's testimony comports with Ryan's testimony regarding petitioner's December 18, 2014, statements that petitioner was not a partner of the limited liability corporation at issue, and that any money petitioner provided to claimant or McLeod was a loan "to help Mr. McLeod out." We note that claimant was unavailable to rebut petitioner's credible and specific testimony.

While petitioner issued a check to claimant for wages McLeod owed her, there is insufficient evidence in the record before us for the Commissioner to have reasonably concluded that petitioner possessed the requisite control over the day-to-day operations of Realty Evictions to find him liable to claimant for unpaid wages (*see e.g.*, *Matter of Wong*, PR 12-090 at 10 [finding no joint employer status where petitioner co-signed employee paychecks, perhaps signed checks for other purposes, and occasionally spoke with people at the restaurant about the restaurant, including once instructing a worker to stop arguing with a manager]; *Matter of Maman*, PR 15-281 at 7 [Oct. 26, 2016] [issuance of a single check absent more does not establish employer status]). Based on the totality of the circumstances, including petitioner's unrebutted and otherwise

credible testimony, we find that the Commissioner's determination that petitioner is individually liable as an employer under Articles 6 and 19 of the Labor Law is unreasonable. Because we find petitioner was not a statutory employer, we revoke the orders in their entirety with respect to petitioner.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is revoked with respect to Kenneth Pieri; and

2. The penalty order is revoked with respect to Kenneth Pieri; and

3. The petition for review is granted.

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 New York, New York
on March 1, 2017.