STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: RODNEY BRAYMAN AND PHOENIX BEVERAGES MTO, LLC AND PHOENIX BEVERAGES, INC., (T/A PHOENIX BEEHIVE AND PHOENIX BEVERAGES LOBO), Petitioners, 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 July 31, 2015, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 15-311 RESOLUTION OF DECISION

APPEARANCES

Kelley, Drye & Warren, LLP (Robert E. Crotty of counsel), for petitioners.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Steven J. Pepe of counsel), for respondent.

WITNESSES

Daniel Walsh and Eugene T. D'Ablemont, Esq., for petitioners.

Kelly Bukovinsky, Andrew Corvino, and Senior Labor Standards Investigator Joseph Ryan, for respondent.

WHEREAS:

On September 29, 2015, petitioners Rodney Brayman, Phoenix Beverages MTO, LLC and Phoenix Beverages, Inc. (T/A Phoenix Beehive and Phoenix Beverages Lobo) filed a petition to review two orders issued against them by respondent Commissioner of Labor on July 31, 2015. Respondent filed its answer on November 5, 2015.

Upon notice to the parties, a hearing was held on February 18 and June 16, 2016, in New York, New York before J. Christopher Meagher, Esq., 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, to make statements relevant to the issues, and to file post-hearing briefs.

The order to comply with Article 6 (supplemental wage order) directs payment of $2,858.93 in vacation pay due and owing to claimant Andrew Corvino for the period from January 1, 2015 to January 4, 2015 and $2,615.39 in vacation pay due and owing to claimant Kelly Bukovinsky for the period from January 1, 2015 to January 6, 2015, together with $420.06 in interest at 16% per annum calculated to the date of the order, 25% liquidated damages in the amount of $1,368.58, and a civil penalty of $10,948.64, for a total amount due of $18,211.60.

The order under Article 19 (penalty order) directs payment of a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for the period from January 1, 2015 through January 6, 2015.

The petition alleges that claimants are not entitled to unpaid wages for unearned and unused vacation and personal days, and that petitioners provided payroll records to respondent during the investigation, and contests the imposition of civil penalties, liquidated damages, and interest.

SUMMARY OF EVIDENCE

Undisputed Facts

Phoenix and Its Vacation Policy

Phoenix is a distributor of beer and liquor employing at least 700 people, with warehouses in Brooklyn and Montgomery, New York. Since 2003, the "Vacation Benefits" section of its employee handbook has stated:

> "The amount of paid vacation time employees receive increases with the length of their employment as shown in the following schedule:
>
> "During your first year of employment, if you start work during the following periods you will be eligible for the following vacation days:
>
> | Period | Eligible |
> |---|---|
> | January, February, March | 5 days vacation |
> | April, May, June | 3 days vacation |
> | July, August, September | 2 days vacation |
> | October, November, December | 0 days vacation |
>
> "On January 1 of the following calendar year of employment, you will be eligible for 5 days of vacation regardless of employment start period.
>
> "Beginning on January 1 of the year of: Eligible

Your third anniversary	10 days vacation
Your fifth anniversary	15 days vacation
Your 10th anniversary	20 days vacation

"The length of eligible service is calculated on the basis of a "benefit year." This is the 12-month period that begins when the employee starts to earn vacation time . . . .

"Paid vacation time can be used in increments of one day. To take vacation, employees should request advance approval from their supervisors. Requests will be reviewed based on a number of factors, including business needs and staffing requirements . . . .

"As stated above, employees are encouraged to use available paid vacation time. In the event that available vacation is not used by the end of the benefit year, employees will forfeit the unused time. There is no carryover of unused vacation from one year to the next.

"Upon termination, employees who are not terminated for cause will be paid for unused vacation time that has been earned through the last day of work."

An "Employee Reminder Notice" also included in the Employee Handbook advised:

"How much Time Off am I entitled to?

"During your first year of employment, you are entitled to time off based on your hire date:

"If you are hired during...	You are entitled to:		
	Vacation	Personal	Sick
January, February, March	5 Days	2 Days	4 Days
April, May, June	3 Days	0 Days	3 Days
July, August, September	2 Days	1 Days	2 Days
October, November, December	0 Days	0 Days	1 Days

"After January 1st of the following year, you are eligible for 5 days of Vacation regardless of your hire date. Thereafter the schedule is as follows:

On January 1st, during the year in which you completed...	You are entitled to:
Your 3rd Anniversary	10 Days
Your 5th Anniversary	15 Days
Your 10th Anniversary	20 Days

"If you have any questions, speak to any member of the Human Resources Team or to your direct supervisor."

Employees can log onto Phoenix's on-line portal, which provides each employee with an "Employee Timeoff Summary" as well as the employee handbook. Both Corvino's and Bukovinsky's Timeoff Summaries as of January 4th and 5th 2015 respectively state:

"Policy Name	Earned	Taken	Remaining
Bereavement	--	0.00 hours	--
Float Holidays	--	0.00 hours	--
FMLA	--	0.00 hours	--
Jury Duty –Non-Union	--	0.00 hours	--
Maternity	--	0.00 hours	--
Personal Non Union	8.00 hours	0.00 hours	8.00 hours
Sick Non Union	40.00 hours	0.00 hours	40.00 hours
Vacation Non Union	120.00 hours	0.00 hours	120.00 hours"

Claimants and the DOL Investigation

Claimants Kelly Bukovinsky and Andrew Corvino began working for petitioners in 2008 and 2010 respectively. On January 5, 2015, both claimants submitted resignation letters effective that day, after having given two weeks' notice.[1] On January 6, 2015 Corvino emailed Hetal Patel of Phoenix's Human Resources Department that "per my supervisor and ADP" he should be paid for 120 hours of vacation. Patel responded:

> "According to the Handbook, Vacation time that ha[s] been earned through the last day of work will be paid. Company provided you with 120 hours of vacation time for the entire year of 2015, and you didn't work the whole year as your last day of work was 01/05/2015. Since you worked 3 days, you are entitled to 2 hours of vacation pay."

On January 9, 2015 Bukovinsky emailed Human Resources Manager Lina Gafaro and Patel that she was entitled to 15 days of vacation.[2] In a February 6, 2015 email, Phoenix executive vice president Daniel Walsh replied that while Bukovinsky would have been eligible for such vacation in 2015 had she worked throughout the year, or to pro-rated vacation pay had she resigned four months into 2015 without having taken vacation, the handbook clearly showed that having worked only two days in 2015, she had not earned and was not entitled to vacation pay.

Bukovinsky and Corvino filed claims for 120 hours of unpaid vacation pay with respondent on January 15, 2015 and January 26, 2015 respectively. Bukovinsky also claimed she was not paid eight hours for a personal day. Both claimants attached to their claims copies of the Employee Timeoff Summary. On January 28, 2015, respondent notified Phoenix that Bukovinsky had filed a claim for unpaid vacation and personal time due as of January 1, 2015 and that if Phoenix disagreed with the claim it should provide a full statement of reasons and include any payroll records, policies, contracts, etc. to substantiate its position. Petitioners' counsel Eugene T. D'Ablemont responded by letter of February 9, 2015, enclosing the "Vacation Benefits" section

[1] Bukovinsky's letter stated 2014 rather than 2015, but the parties agreed this was a typographical error.
[2] In her claim to respondent, Bukovinsky equated the 15 days to 120 hours of unused vacation.

of the employee handbook and Walsh's February 6, 2015 e-mail to Bukovinsky. D'Ablemont's letter stated: "Like vacation time, personal time is earned on a calendar year accrual basis."

On February 17, 2015 respondent's Senior Labor Standards Investigator Joseph Ryan wrote to Phoenix stating that D'Ablemont's letter was insufficient to dispute Bukovinsky's claim because the policy Phoenix provided states that after employees' fifth anniversary they are eligible for 15 days of vacation on January 1st of that year, and "does not state that the vacation time is prorate[d] or is earned on an accrual basis." Ryan's letter further indicated that Bukovinsky gave respondent a copy of her Timeoff Summary that showed that she had earned 120 hours of vacation as of January 4, 2015.

D'Ablemont replied on February 23, 2015 that the handbook does not entitle employees "to receive on January 1, 2015, or anytime thereafter, vacation pay for the full number of vacation days the employee is eligible to receive during that calendar year . . . . You earn that vacation time off with pay during that calendar year as you work" (emphasis in original). D'Ablemont noted that the last sentence of the handbook's vacation section refers to "unused vacation time that has been earned through the last day of work." He also reasoned that since unused vacation time at the end of a calendar year is forfeited, the payment does not constitute a bonus, deferred wages or severance pay and is only provided when employees take a vacation. When Bukovinsky "terminated herself after working two (2) days in 2015" she was not going on vacation, nor had she earned any time for 2015 through her last day of work. On April 16, 2015, respondent notified Phoenix of Corvino's claim and on April 28, 2015, D'Ablemont responded taking the same position as with respect to Bukovinsky.

On April 29, 2015, respondent notified Phoenix of a compliance conference concerning the claims to be held May 18, 2015, which would provide a final opportunity to bring any new evidence not provided during the investigation. This letter specifically requested payroll records for Bukovinsky and Corvino for the time period from January 1 through January 6, 2015. As reflected in a DOL Conference Summary Record, D'Ablemont, the claimants, Ryan, and respondent's Labor Standards Investigator Carla Valencia, appeared before respondent's Administrative Law Judge John Scott.

Petitioners' Evidence

Testimony of Daniel Walsh

Daniel Walsh, Phoenix's executive vice president since July 2001, testified that he initiated drafting of the vacation benefits section of the Employee Handbook in 2003 to make sure it reflected the company's intent and complied with the law. The policy was adopted with input from D'Ablemont and others at the company. The handbook is published on petitioners' Human Resource on-line system and all employees sign an acknowledgment that they have read it.

Prior to the policy's adoption, Phoenix employees were not entitled to vacation time in the first year of employment. Walsh felt the policy discouraged good candidates from applying and he changed it to assure employees that they are entitled to earn and take vacation during their first year. The handbook makes clear that vacation days can only be taken in the year they are earned and do not carry over from year to year. Employees must request specific vacation days from their managers, who approve them based on the needs of the business and other employees. "[T]he

intent was never to front load vacation" but to schedule vacations for the year in order to manage the business appropriately. Employees are encouraged to apply for their vacations early in the year and to use their vacation time, but are discouraged from taking vacations during peak holiday or summer periods. Under petitioners' policy, upon resignation or termination other than for cause, employees are paid for unused vacation time earned through the last day of work. For example, if an employee eligible for ten days' vacation resigns on June 30, "that would mean they had earned five days' vacation." If the employee had already taken three vacation days, payment for two days would be made. According to Walsh, it was "very, very clear" that the language concerning the number of vacation days an employee is entitled to on January 1st each year is simply to help them plan vacations and refers to eligibility that "you earn throughout the year," assuming the employee continues to work. Someone who resigned on January 1st "clearly had not earned any vacation for that benefit year."

Walsh asserted that Phoenix had never violated any federal, state, or local labor laws, had acted in good faith at all times, and had provided respondent with all of the information it requested during its investigation. He noted that a July 7, 2015 letter from D'Ablemont to respondent summarizing the May 18, 2015 compliance conference stated: "I handed up the requested payroll records for both Ms. Bukovinsky and Mr. Corvino."

On cross-examination, Walsh testified that while the handbook does not specifically address how vacation time is accrued after an employee's first year, nonetheless it is "understood as the year progresses, more eligible vacation time is earned." When asked if an employee entitled to 15 days' vacation on January 1st is permitted to take a two-week vacation in March, he replied that managers have discretion to approve the request "on the assumption that the individual would continue his or her employment . . . . [T]he policy does not prohibit that." Asked if an employee who resigned in April would have to reimburse Phoenix for excess vacation taken, Walsh stated: "The policy doesn't speak to that."

Walsh testified that the Employee Timeoff Summary listing claimants as having "Earned" 120.00 vacation hours as of January 4 and 5, 2015 was simply "a snapshot of a computer screen that was available to the employees to monitor their days of eligibility." Phoenix downloads employees' eligibility on January 1st based on the assumption that they will be employed for the full year. The Timeoff Summary referred to 120 hours "Earned" because the software Phoenix used made it impossible to substitute the word "eligible."[3] It would have been clear to the claimants, however, that the summary showed "eligible hours for 2015 based on [their] working for the company for the full year" and that it did not supersede the handbook's provision regarding payment for unused vacation time upon termination "that has been earned through the last day of work." He did not know whether any employee had ever been paid unused vacation time in circumstances like the ones presented by claimants.

Testimony of Eugene T. D'Ablemont, Esq.

Eugene T. D'Ablemont is a labor lawyer who has represented Phoenix for many years. In 2003, D'Ablemont worked with Phoenix's then director of human resources to draft the handbook's vacation section, based on Walsh's recommendations and discussions with Phoenix's chief executive officer, petitioner Rodney Brayman.

[3] In his testimony summarized below, D'Ablemont stated that the software is not Phoenix's but that of its payroll company ADP.

Under the vacation policy in effect since 2003, employees are eligible on January 1st each calendar year for a number of vacation days based on their length of service. They are encouraged to take these days during the year on a "use it or lose it" basis. An employee starts on January 1 "with nothing in the bank" and having "used everything that she may have accrued in the past." The Timeoff Summary informs employees of the amount of vacation they will be able to take during the calendar year. Employees can generally choose when to take their vacation, except during periods of peak work such as the period from Thanksgiving to the end of the year. It is assumed the employees will complete the year following their return from vacation. The assumption generally proves true, particularly for commission employees whose peak earning period is the last six weeks of the year.

According to D'Ablemont, the last sentence of the handbook's vacation section ("Upon termination, employees who are not terminated for cause will be paid for unused vacation time that has been earned through the last day of work") was intended to convey that vacation pay would be paid on a *pro rata* basis. D'Ablemont named four former employees who left their employment in the middle of a calendar year and were paid a prorated share of their full year's vacation eligibility. He acknowledged that records show that Greg Corvino, claimant Andrew Corvino's brother, was paid his full year's vacation eligibility when he resigned at the end of May 2014. The payment was "against company policy," however, and there was "no explanation as to why he was paid." An employee named Sal Difatta requested unused vacation pay upon resignation early in January and records indicate that Walsh denied the request.

In response to respondent's collection letter of January 15, 2015, D'Ablemont provided the vacation policy and correspondence with Bukovinsky because it was petitioners' position that no vacation pay was due under the policy. When respondent requested that petitioners bring claimants' payroll records for the beginning of January 2015 to a compliance conference, he brought records for the payroll dates January 2 through January 9, 2015 and gave them to an unidentified woman in New York City who brought them to a conference room where Scott and Ryan appeared on video from Albany. D'Ablemont did not know if the person was Valencia. The payroll records listed the claimants' regular pay, extra payments, commissions, travel expenses and total gross pay. Since claimants were outside salespeople and overtime exempt, petitioners did not maintain time cards for them.[4] At the compliance conference, Scott asked whether either side had anything new to offer, and neither did. No mention was made of payroll records during the conference.

On cross-examination, D'Ablemont stated that under Phoenix's policy, vacation time is earned during each year of employment "exactly the same as the first year . . . except you get more vacation as you move on. The same accrual system applies." The employee handbook states that the length of eligible service is calculated on the basis of a "benefit year," which is the 12-month period that begins when the employee starts to earn vacation time. D'Ablemont concluded, "To me, having participated in drafting it that means you prorate it as you earn it during that year."

D'Ablemont further testified that if approved by a supervisor, employees could take 15 days of vacation in February "even though they had not earned it, but they are going on vacation and the assumption is you're coming back." Employees who resign, however, are paid only for

[4] Labor Law § 195 [4] requires "accurate payroll records showing for each week worked the hours worked," but for overtime-exempt employees, unlike other employees, the records need not "include the regular hourly rate or rates of pay, the overtime rate or rates of pay, the number of regular hours worked, and the number of overtime hours worked."

unused vacation days earned to that point. He later added: "can you beat the game? Sure . . . [B]y saying I'm going on vacation . . . . And then the person turns around and resigns and doesn't come back . . . . Would they be required to pay it back? Probably not. I just don't know. It probably would not be financially possible."

D'Ablemont has never been asked to pursue an employee to return unearned vacation pay and does not believe Phoenix would do that if a person resigned for a bona fide, unexpected reason. "On the other hand, someone leaves for vacation and says I'll see you when I get back and we know that person after they left worked for a competitor and knew they were not going to finish the entire year, then that person is scamming you." In such a case, D'Ablemont believes that Walsh or Phoenix's Human Resources Department might write the person stating, "You owe us X amount of dollars."

On re-direct examination, D'Ablemont stated that there have been instances when employees resigned in September having already used all vacation days to which they were eligible for the entire year. Phoenix does not generally seek reimbursement for such unearned but already-used vacation. Such cases are not a widespread practice and "we would have never allowed somebody to take their full year's vacation entitlement in January."

Respondent's Evidence

Testimony of Kelly Bukovinsky

Bukovinsky testified that her understanding of Phoenix's vacation policy was that she was eligible for 15 days' vacation as of January 1st every year and that employees could even take a vacation day on January 1 or 2. No one told her while she was employed that vacation time was accrued progressively throughout the year. During her last few years at Phoenix she generally took five days' vacation the first or second week of March. She never knew any employee to be denied vacation because it was not yet earned, and believed that other employees, including Corvino's brother, were paid for unused vacation when they were terminated or resigned. On cross-examination, Bukovinsky testified that she understood vacation not used during the year did not roll over and that her supervisor had to approve specific vacation times. Bukovinsky took all the vacation to which she was entitled in 2014 during that year.

Testimony of Andrew Corvino

Corvino testified that his understanding of the policy was based on the employee handbook and his check stubs stating that he had earned 120 hours vacation as of January 1st each year. His yearly vacation entitlement "always accumulated on my pay stub the first of the year." While Corvino understood that vacation not taken during the year was forfeited, he was never notified that vacation pay accrued over the year. Corvino was never denied vacation because he had not yet earned it, nor did he know of anyone else who was denied vacation for that reason. Corvino's brother worked for Phoenix for two years, left in May, and was paid his full vacation time for the year. Corvino also knew other people who were paid for the unused portion of a full year's vacation when they left Phoenix and understood this to be the company's practice. On cross-examination, Corvino agreed that although the issue was never specifically discussed, he assumed that the supervisor who approved his vacations thought he would return afterwards.

Testimony of SLSI Joseph Ryan

Ryan testified that he has been a Senior Labor Standards Investigator for three years and was previously a Labor Standards Investigator for six. He understands that the Labor Law allows a vacation policy to specifically state how vacation is earned or accrued such as per pay period or per month. Phoenix's vacation policy, however, has no such provision and states that vacation days are earned on January 1st although petitioners' repeatedly stated during the investigation that they did not owe the claimants vacation pay because it is accrued throughout the year, this is not stated in the vacation policy.

Ryan testified that he had not seen the records petitioners claim were provided at the May 18, 2015 compliance conference prior to the hearing before the Board. According to Ryan, ALJ Scott asked D'Ablemont for records and the latter "stated that he had no appropriate payroll records . . . . I did not see the records. Maybe Mr. D'Ablemont reached across the desk to the claimant, but I did not see it and there were no payroll records produce[d]." Ryan did not call D'Ablemont to dispute or inquire about the statement in his letter of July 7, 2015 that records were supplied "because that was discussed at the compliance conference" and "because it was his job to present them on May 18."

Ryan testified that he assessed a 200% civil penalty in the supplemental wage order due to the "multiple correspondence, [stating] the same thing over and over again." The Issuance of the Order to Comply Cover Sheet prepared by Ryan in support of the penalty recommendation states that Phoenix is not a new firm, the company had no prior history of violations, and that two claimants were underpaid. It further asserts that the company was uncooperative because its vacation policy was insufficient to dispute the claims and because it did not pay the amounts due after a final letter and compliance conference. Finally, the report adds that the company's records were inadequate, although they did not impede the investigation.

According to Ryan, the $1,000.00 penalty assessed in the penalty order for failure to maintain records was the "minimum record penalty" and was warranted based on the amount of the vacation claims.

STANDARD OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether an order issued by the Commissioner is "valid and reasonable" (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 shall be deemed waived (Labor Law § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (Labor Law § 103 [1]).

The hearing before the Board is *de novo* (12 NYCRR 66.1 [c]) and if the Board finds that the order or any part thereof is invalid or unreasonable it is empowered to affirm, revoke or modify the order (Labor Law § 101 [3]). Petitioners have the burden to prove by a preponderance of the evidence that the orders are not valid or reasonable (State Administrative Procedure Act § 306 [1]; Labor Law § 101 [1]; 12 NYCRR 65.30; *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 the provisions of Board Rule 65.39 (12 NYCRR 65.39).

The Supplemental Wage Order Is Affirmed As Modified

The Claimants Are Owed Vacation Pay

New York does not require employers to provide vacation pay to employees, but when an employer does have a paid vacation policy, Article 6 of the Labor Law requires the employer to pay such agreed-upon "benefits or wage supplements" as part of wages in accordance with the policy's established terms (Labor Law §§ 190 [1] and 198-c [2]).

Labor Law § 195 (5) further requires an employer to "notify his employees in writing or by publicly posting the employer's policy on . . . vacation." Forfeiture of vacation pay upon termination must be specified in the employer's vacation policy or in an agreement with the employee (*Matter of Marc E. Hochlerin et al.*, PR 08-055 at 4-5 [March 25, 2009]). Forfeiture provisions must be explicit (*Matter of Center for Financial Planning, Inc.*, PR 06-059 at 5-6 [January 23, 2008]; *see also Paroli v Dutchess County*, 292 AD2d 513 [2d Dept 2002] [worker was entitled to vacation pay upon termination as the employer's benefit plan contained no language limiting the benefit only to employees in "good standing"]). The Board held in *Matter of Knight Marketing Corporation of New York State,* PR 09-200 (September 9, 2011) that while many vacation policies state that vacation is earned *pro rata* over time at a stated rate, policies that deem all vacation days to be earned and available at the commencement of the year are also legally enforceable (citing *Matter of City of Middletown v. City of Middletown PBA*, 30 AD 3d 597 [2d Dept 2006]). If a policy does not so state, it cannot simply be assumed that vacation accrues *pro rata* (*Knight Marketing Corporation,* at 5-6).

The issue in this case is whether the Commissioner validly and reasonably concluded that claimants were entitled to and earned vacation pay as of January 1, 2015 or whether there was an implicit understanding that vacation days were not immediately available on January 1, and were to be earned and accrued on a *pro-rata* basis throughout the year. Walsh testified that while the employee handbook does not specifically address how vacation time is accrued after an employee's first year, it is "understood as the year progresses, more eligible vacation time is earned." According to D'Ablemont, vacation time is earned during each year of subsequent employment "exactly the same as the first year . . . except you get more vacation as you move on. The same accrual system applies."

In *Knight Marketing Corp., supra*, the employer's Leave Policy provided twelve paid "Flex Days" (including "sick, vacation, personal, family emergencies etc.") per year. The days did not roll over to the next year but the policy provided payment for unused days. An employee laid off in March requested payment for all twelve days, not the three offered by the employer, whose president testified that there was an assumption of accrual that he did not write into the rules (*Id.* at 2-3). The Board rejected the employer's contention of an implicit understanding that the twelve flex days were not immediately available but were to be earned and accrued *pro rata* throughout the year:

> "[W]e find that just as an employee must be paid for accrued vacation unless the employer has, through a written policy or agreement, specified that accrued vacation pay is forfeited, a terminated employee is entitled to all promised vacation pay unless the employer has, through a written policy or agreement, specified that such vacation pay must be accrued *pro rata* over a specified period of time (*Id.* at 6)."

Likewise, in *Matter of Stephen S. Mills et al.*, PR 14-104 at 11-13 (July 22, 2015), a hospital's employee handbook, like the employee handbook in the instant case, stated that after six months' employment "employees will be credited each January with a full year's vacation entitlement for their use during the calendar year," with entitlement not used by December 31st of each year not carried forward. The hospital's vice president for HR testified, as petitioners' witnesses did here, that the purpose of the provision was to make vacation time available throughout the year and to help employees plan their vacations, on the assumption that they would work the full 12 months and accrue time throughout the year (*Id. at* 5-6). When the hospital outsourced its ambulance work and terminated its ambulance division employees, the hospital deducted from their vacation balances amounts which the hospital contended had not yet been earned. We rejected the hospital's position, and relying on *Knight Marketing Corp, supra,* ruled that regardless of the hospital officials' understanding of the policy, in the absence of specific provision in the employee handbook stating that vacation pay was earned *pro rata* or that such policy was otherwise communicated to the claimant, the hospital failed to prove that his vacation balance was subject to forfeiture or reduction at the time of his termination.

We find respondent validly and reasonably concluded that petitioner's vacation policy entitled the claimants to be paid for vacation time and personal time on January 1st. Phoenix's vacation policy as stated in the handbook did not clearly specify that the vacation for which employees were eligible in a given calendar year was to be earned *pro rata* over the course of the year, as opposed to being earned and available "on January 1," as the policy repeatedly states. Indeed, in the section called "How much Time Off am I entitled to?" the handbook tells employees that after their first year on January 1st of every year thereafter "You are entitled to" a specific number of vacation days that increase with the number of years of service. Our reading of the policy is supported by the fact that the Timeoff Summary indicated that claimants had "Earned" 120 vacation hours and 8 personal hours as of the first week of January. The vacation policy included no accrual schedule or even a statement that entitlement after the first year of employment was subject to accrual. The plain reading of the policy is that "eligible" and "earned" were synonymous and that employees past their first anniversary date are eligible for and have earned the specified amount of vacation as of January 1st.

In the instant case, as in *Stephen S. Mills,* claimants were never informed that vacation or personal days were earned on a *pro rata* basis. They relied on the company's Timeoff Summary showing that they had earned 120 hours of vacation pay and 8 hours of personal leave as of January 1, 2015, consistent with the vacation provision in the employee handbook. While Walsh testified that petitioners' intent was never to "front load" vacation, we find the plain meaning of the handbook's language was to do so because employees were told they were eligible for such benefit on January 1st each and every year. In *Knight Marketing Corp., supra,* we noted the general legal rule "that any ambiguities in a contract 'must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language.' (*Jacobson*

v Sassower, 66 NY2d 991, 993 [1985])." To the extent that the vacation policy in this case is ambiguous, the principles recognized in *Knight* and *Sassower* require that any ambiguity be construed against Phoenix, the drafter of the policy.

Finally, petitioners pointed to past practice where employees were denied a full year's vacation payment when they had worked for only part of the year. Petitioners did not submit payroll records substantiating this practice and the evidence was contradicted by their admission that another employee was paid a full year of vacation when he worked for only part of the year. The contradictory evidence of past practice does not overcome the plain and clear meaning of the policy itself, which we find consistent with claimants' entitlement to vacation pay.

While petitioners remain free to adopt and publish a policy under which vacation entitlement is earned *pro rata* over the course of a calendar year, or is forfeited on resignation before a certain date, such policy must be clearly stated and cannot be adopted ad hoc or after the fact because of what petitioners deem a result they did not intend. We affirm the supplemental wage order finding that claimants were entitled to vacation pay, including personal days, upon their resignation. Petitioners did not challenge the amounts found due for vacation pay and we affirm those findings as well.

Interest

Labor Law § 218 (1) and § 219 (1) provide that when the Commissioner finds a violation of Labor Law Article 6 involving failure to pay wage supplements, 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 hearing to challenge the interest. We therefore affirm the interest imposed in the supplemental wage order.

The Civil Penalty in the Supplemental Wage Order Is Revoked

Labor Law § 218 (1) provides that "in addition to directing payment of wages, benefits or wage supplements found to be due," an order issued:

> "to an employer who previously has been found in violation . . . or whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount not to exceed double the total amount of . . . wage supplements found to be due. . . . In assessing the amount of the penalty, the commissioner 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 . . . supplements violations, the failure to comply with recordkeeping or other non-wage requirements."

The supplemental wage order in the present case assessed a civil penalty in the amount of 200% of the vacation pay found due.

Respondent provided no valid and reasonable explanation for the imposition of a 200% penalty. Ryan testified that he assessed the maximum penalty because petitioners said "the same thing over and over again." However, adherence to a position with which respondent disagrees does not rise to the level of a "willful or egregious" violation nor did petitioner have prior violations which are the only basis upon which a 200 % civil penalty may be assessed. The order to comply cover sheet that Ryan prepared indicates that Phoenix had no prior history of Labor Law violations. We find that the record furnishes no basis supporting the penalty imposed in the supplemental wage order and modify that order by revoking the penalty imposed.

The Liquidated Damages in the Supplemental Wage Order Are Revoked

The supplemental wage order includes liquidated damages in the amount of 25% of the supplemental wages owed. Labor Law § 218 (1) requires respondent to include liquidated damages of 100% of the wages found due with the order. Liquidated damages must be paid by the employer unless the employer "proves a good faith basis to believe that its underpayment was in compliance with the law." While Labor Law § 218 requires the Commissioner to include 100% liquidated damages in her order to comply, Labor Law § 198 provides that liquidated damages shall be calculated by the Commissioner as "no more than" 100% of the underpayments found due. On the record before us, petitioners' reliance on outside counsel to draft their vacation policy establishes a good faith belief that the underpayments were in compliance with the law. Respondent presented no evidence to rebut this or to show petitioners acted in bad faith. The record, therefore, does not support respondent's assessment of liquidated damages in this matter and we revoke that portion of the order.

The Penalty Order Is Revoked

The penalty order assessed a $1,000.00 civil penalty for the supposed failure to keep and/or furnish true and accurate payroll records for the period from January 1, 2015 through January 6, 2015. D'Ablemont credibly testified, however, that at the May 18, 2015 conference he produced what he believed to be the records respondent requested. While Ryan stated he never saw the records before their introduction in evidence at hearing, D'Ablemont's credibly testified that he handed the records to a "lady" (presumably, Labor Standards Investigator Valencia) at respondent's New York City office, while Ryan attended through a video link from Albany. Ryan himself testified: "I did not see the records. Maybe Mr. D'Ablemont reached across the desk to the claimant, but I did not see it."

Respondent did not call Valencia to testify and it is undisputed that when D'Ablemont stated in a July 7, 2015 letter to respondent that he had submitted the records at the conference, Ryan did not question or deny the statement. We find that petitioners provided the requested records and that the penalty order was therefore unreasonable. We revoke it accordingly.

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NOW THEREFORE, IT IS HEREBY RESOLVED THAT:

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

2. The penalty order is revoked; and

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

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Absent
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 January 25, 2017.