STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: STEPHEN S. MILLS AND THE NEW YORK HOSPITAL MEDICAL CENTER OF QUEENS, 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, all dated March 20, 2014, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 14-104 RESOLUTION OF DECISION

APPEARANCES

Nixon Peabody, LLP (Tara E. Daub, Esq. and Tony Dulgerian, Esq., of counsel), for petitioners.

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

WITNESSES

Lorraine Orlando and Shirley Malewicz, for petitioners.

Adam Pollack and J.C. Dacier, Senior Labor Standards Investigator, for respondent.

WHEREAS:

On May 19, 2014, The New York Hospital Medical Center of Queens (petitioner or hospital) filed a petition to review an order to comply with Article 6 of the Labor Law, and an order under Article 19 of the Labor Law, that the Commissioner of Labor (respondent, Commissioner or DOL) issued against Stephen S. Mills (Mills) and New York Hospital Queens Foundation, Inc. T/A New York Hospital of Queens on March 20, 2014. The order to comply with Article 6 (supplemental wage order) directs payment of $3,251.34 in holiday, sick and vacation pay[1] due and owing to claimant Adam Pollack for the period from May 19, 2013 to

[1] At the hearing, the parties stipulated that the amount stated as due and owing was solely for vacation pay, and DOL was not seeking reimbursement for sick pay or holiday pay.

June 1, 2013, together with $429.00 in interest at 16% per annum calculated to the date of the order, 25% liquidated damages in the amount of $812.84, and a civil penalty of $3,251.34 for a total amount due of $7,744.52. The second order under Article 19 (penalty order) directs payment of a total of $500.00 in civil penalties for failing to keep and/or furnish true and accurate payroll records from January 1, 2013 through June 16, 2013.

The petition alleges that the claimant was not entitled to vacation pay beyond the amount that accrued through the date of his separation of employment. The petition also contests the imposition of liquidated damages, the civil penalty, and interest. Respondent filed an answer on July 7, 2014. During the hearing, the petitioners' motion to amend the petition to contest Mills' individual liability was unopposed and was granted, and the DOL's answer was amended to deny the allegation.

Upon notice to the parties, a hearing was held on December 9, 2014 and January 21, 2015, in New York, New York before Administrative Law Judge Jean Grumet, the Board's 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 parties filed post-hearing briefs on March 16, 2015.

THE PARTIES

The orders were issued against Stephen S. Mills and "New York Hospital Queens Foundation, Inc. (T/A New York Hospital of Queens)." The petition, filed by The New York Hospital Medical Center of Queens, did not challenge the orders' designation of the corporate employer. At the start of the hearing, the petitioners' motion to amend the petition to contest the individual liability of Stephen S. Mills, the hospital's president and CEO, was unopposed and was granted. The petitioner did not otherwise amend or seek to amend the petition at any time. The evidence submitted at the hearing, including check statements issued by the employer, confirms that The New York Hospital Medical Center of Queens acted as an employer, and is liable as such.

In their post-hearing brief, petitioners -- while again confirming that the New York Hospital Medical Center of Queens acted as claimant's employer -- for the first time asserted that "the DOL cannot demonstrate that the Foundation [New York Hospital Queens Foundation, Inc.] employed Mr. Pollack, and as such, that entity was improperly named." However, the petitioners, who bore the burden of proof, submitted no evidence concerning the New York Hospital Queens Foundation, Inc. More fundamentally, the issue was not raised in the petition or prior to the close of the hearing, and was therefore waived pursuant to Labor Law § 101 (2). Nor were the petitioners prejudiced by the initial omission in the orders of the words "Medical Center." Inasmuch as the petition itself corrected the name of the hospital and petitioners have never denied the hospital's employer status, we find that the initial failure to include the words "Medical Center" in its name was harmless error, was not objected to, and that any possible objection has been waived. (*See, e.g., Matter of NYC Dep't of Transportation*, Docket PES 06-004 p 7 [Dec. 17, 2008] [denying motion to introduce new objection to DOL order based on petitioner's failure to raise the issue in its petition or prior to close of hearing]; *Matter of Piotr Golabek and Amica Corp.*, Docket PR 09-127 p 9 [Dec. 14, 2011] [same]). We clarify the hospital's name as "The New York Hospital Medical Center of Queens."

MOTIONS TO DISMISS

The petitioners made a motion to dismiss the orders on the basis that two wage statements that formed the basis for the penalty order were provided only the day before the hearing, and not when the respondent agreed to provide petitioners with the full investigative file during the November 21, 2014 pre-hearing conference. Petitioners also requested that an adverse inference be applied because of the DOL's alleged removal of these documents from the investigative file. Respondent cross-moved to dismiss the petition on the basis that the petitioner failed to provide until the day before hearing, several documents, including a redacted attendance sheet for a May 13, 2013 "Mandatory Town Hall Meeting" which included Pollack's signature. The Hearing Officer withheld ruling on the petitioners' motions and the DOL's cross-motion.

We deny the petitioners' motion to dismiss and motion for an adverse inference as well as the respondent's cross motion to dismiss. Both parties were provided with the documents in question before the hearing, neither party was prejudiced or prevented from proving their claims, and nothing indicates or suggests any intentional withholding of documents. Neither party subpoenaed nor demanded documents through a bill of particulars. We find that both the petitioners and respondent's furnishing documents the day before the hearing were harmless error, and in both cases documents were immediately furnished when the omissions came to light. (*Cf: Matter of Young Hee Oh,* PR 11-017 p 15 [May 22, 2014]; *Matter of Guillermo M. Ramirez and Julio C. Ventura and Memo Apparel, Inc.,* PR 09-354 [July 26, 2011] *aff'd* 110 AD3d 901 [2d Dept 2013]).

SUMMARY OF EVIDENCE

Testimony of Lorraine Orlando

Orlando, the hospital's vice president of human resources for the past 16 years, has been employed by the hospital since 1987. Prior to holding her current position, she was the hospital's director of human resources. Orlando oversees the hospital's staffing, including overseeing its contractual obligations, setting employee salaries, negotiating benefit plans, and setting the policies and procedures for the hospital's 3,700 employees.

When employees are hired, they spend their first day of work at an orientation where employee policies and procedures, including the hospital's vacation policy, are discussed. A December 12, 2005 New Hire Orientation Sheet signed by Pollack indicated that he was initially hired as a per diem paramedic in the ambulance department and attended the orientation. On December 12, 2005, and again on October 18, 2006, Pollack signed Acknowledgement of Receipts stating that he received a copy of the Employee Handbook then in effect. The hospital's June 2007 Employee Handbook, which is still in effect at the hospital, is distributed to all employees, and contains essentially the same language as the prior Employee Handbook including the following relevant provisions:

VACATION

All regular full-time employees who have completed six (6) months of continuous employment are eligible for paid vacation time. The amount of vacation time you receive will depend on your job classification and length of service.

After the completion of six (6) months of continuous employment, new employees will receive a designated accrual of vacation time, appropriate to their job classification, reflecting six months prior time worked and future accrual up until the end of the calendar year. Thereafter, employees will be credited each January with a full year's vacation entitlement for their use during the calendar year.

All vacations must be scheduled in advance according to your department's procedures. When a scheduling conflict arises in granting vacation among employees, classification seniority will be the deciding factor.

If you do not work on the day before or after a scheduled vacation due to illness, you will be required to submit a physician's note in order to be paid for the day.

All vacation accruals must be used by December 31st of each year. Accruals will not be carried forward and will be deleted.

TERMINAL PAY

You will receive your final paycheck, reflecting all accrued but unused vacation, holiday or personal time, less any sick time taken in excess of the accrual, on the payday following your last regular paycheck regardless of the reason for termination.

SICK LEAVE

Upon completion of 30 days of employment, employees begin to accrue sick leave at a rate of one day per month. After one year of employment, you will receive your annual sick leave entitlement on January 1 of each year. If at the time of termination you have used advance sick time not actually earned, any accrued vacation, holiday or personal time will be reduced by this advanced sick time.

PERSONAL DAYS

Full time employees are entitled to four personal days each year. They are earned as follows: one day January 1st, one day April 1st,

> one day July 1st, one day October 1st. All personal time must be used by December 31st of each year or you will lose the time. Personal days must be scheduled in advance just like vacation.

HOLIDAYS

> The Medical Center recognizes eight (8) paid holidays.

In addition to the Employee Handbook, the hospital has a separate policy and procedure manual, "The New York Hospital Medical Center of Queens Human Resources Policy and Procedures Manual," which is more descriptive than the Employee Handbook. Every department has a copy of the Manual, but Orlando does not know where each department keeps it. All employees have access to the Manual on the hospital's Intranet, and a computer terminal was located in the ambulance base prior to 2013. A copy is also available for employees to view in the Human Resources department. Each of the policy sections of the Manual listed below, including the vacation policy at issue in this matter, was specifically approved and signed by both Mills, as President and CEO, and Orlando as Vice President for Human Resources, on the following dates:

Vacation	4/14/09
Vacation accruals	7/16/09
Vacation accrual during leaves of absence	4/14/09
Family and Medical Leave	4/21/09
Sick leave	4/15/09
Personal Days	4/17/09
Holidays	10/23/09
Legal Holidays	10/23/09

Orlando testified that as best she can remember, vacation accrued every pay period except under certain circumstances when an employee took a leave of absence.

In 1999, the hospital decided that vacation pay would be "front loaded," or advanced, in January so that the employee's vacation time would be available for use throughout the year to make it easier for employees to plan their vacations. On January 7, 1999, Orlando issued a written memorandum to employees explaining the change in the policy. The memo stated in relevant part:

> "I am pleased to announce that we are changing the way you will accrue vacation time. Instead of accruing vacation time, pay period by pay period, you will be advanced **your entire annual vacation accrual during the first pay period of each year.** You will have until **December 31st of each year to use your annual accrual.** With this system, you will be able to plan for the use of your vacation time throughout the year [emphasis supplied].
>
> "Please keep in mind that this is an advance of vacation time. If you should leave employment with the medical center during the year, and you have used vacation time beyond what you have

> earned up to your date of termination, payroll will calculate the amount of vacation time you normally would have been entitled to and will deduct it from any moneys due you."

The assumption behind the front loading policy was that employees would be working at the hospital for the full 12 months so they could use the time throughout the year. The policy of front loading vacation pay combined with pay period by pay period accrual of vacation time has not changed since the January 7, 1999 memo, and has been consistently applied to all departing employees during the past 16 years. Orlando estimated that 200-250 employees come off the payroll each year, and each of those employees was paid for "[a]ny time that they had accrued from their last day of employment that had not been used" according to the policy established in the 1999 memo. Since 1999, no employee has made a complaint or filed a grievance regarding the hospital's accrual policy.

On January 8, 2007, Orlando sent out a memorandum to hospital employees informing them of a change in how personal and legal holiday accruals would appear on their check stubs, and how they would be allowed to use this time:

> "Personal and holiday time will be combined into one "bucket" identified on your pay stub as "Holiday." This time will be front-loaded each January in the same manner as vacation and sick time. You will have from January 1st to December 31st to use this time and any time remaining at the end of the year will be lost.
>
> "Please be advised that, as is the case with sick time, if an employee leaves employment during the year and has exceeded his/her year-to-date personal or holiday accrual, this time will be deducted from any accrued vacation time.
>
> "Accrual balances are currently being adjusted and will appear on your 1/25/07 check stub."

Pollack's job classification was "technical," and his job title was "paramedic," and as such he was eligible for 20 days of vacation per year. In early May 2013, the hospital made the decision to outsource its ambulance work to Hunter Ambulance effective May 26, 2013. A May 13, 2013 letter sent to all hospital ambulance division employees and signed by Mills as President and CEO, as well as Orlando and two other hospital officials, explained that under the hospital's agreement with Hunter, all paramedics and EMTs would be offered a position at Hunter. The letter further stated:

> "Ambulance Division employees will no longer be employed by NYHQ after close of business on May 25, 2013. Employees will receive payment from NYHQ for any accrued but unused vacation, holiday or personal time on the next regular payday after that date."

Also on May 13, 2013, hospital representatives conducted "Mandatory Town Hall Meetings" at the ambulance base for the various shifts to explain the transition to Hunter.

Pollack signed a sign-in sheet listing his name, EMT-P certification, and status as a full time employee. At this meeting, Orlando explained that on May 25th, the hospital would calculate "any accrued but unused time that anyone may have and they would be paid out for that."

On cross-examination, Orlando testified that the 1999 memo explaining the front loading of vacation pay was never re-sent to employees, and that Pollack was not employed by the hospital in 1999. Orlando admitted that nowhere in the Employee Handbook or in the Manual does it explicitly state that vacation time accrues from pay period to pay period.

Testimony of Shirley Malewicz

Malewicz has been employed by the hospital since 1984, and has been its Payroll Director for the past ten years. Her duties consist of processing bi-weekly payroll, quarterly tax filings, and completion of W-2's, overseeing her staff, and processing paperwork including leaves of absences, returns, changes in pay rates, and separation pay. Mills and the hospital's CFO and Senior Vice President, Kevin Ward, sign employee paychecks.

For purposes of calculating terminal pay, employees accrue one sick day per month, one personal day per quarter, and holidays are accrued "as the holiday falls." Employees do not accrue vacation time in their first six months of employment. After six months "they receive whatever their appropriate entitlement is, reflecting six-months prior time worked and the future accrual up to the end of the year." If an employee went on a personal leave of absence, no vacation time would accrue. For a medical leave of absence, an employee with one to five years of service can be out for up to five weeks while continuing to accrue vacation time, and one with over five years of service can do so for up to thirteen weeks. Since 1999, vacation is front loaded based on service through the calendar year and is accrued on a pay period by pay period basis. The Payroll Department calculates terminal pay for vacation pay based on the January 7, 1999 memo which informed employees that "personal and holiday time will be combined into one 'bucket' identified on [employees'] pay stubs as "Holiday" and that "this time will be front loaded each January in the same manner as vacation and sick time."

When the hospital entered into the agreement with Hunter to take over the ambulance division, Malewicz calculated the terminal pay for the ambulance division employees, including Pollack. She created a spreadsheet that included the employee's identification number, job title, a calculation for any unearned time through the end of the year, and the balances for vacation, sick, and holiday time. "Balance" meant the "balance that was remaining in the system . . . . It is a combination of any time that was front loaded." Malewicz completed the spreadsheet on May 26, the last day that the hospital employed the ambulance division employees. She deducted the vacation days Pollack had already taken in 2013, and calculated that he was entitled to .75 hours of vacation pay. In order to be entitled to a full 20 days of vacation, Pollack would have had to work the entire year.

Pollack received his final paycheck on June 6, 2013. ADP, the hospital's payroll service, did not provide the hospital with the hard copy of the actual paystub that was provided to employees. Instead, ADP provided the hospital with system-generated copies that were not identical to employee paystubs. With regard to the paystub received by Pollack, the right side of the pay stub contains the balances in the hospital's system regarding accruals of vacation, holiday, sick and personal days. These balances, labeled as "total to date" on the pay stubs,

reflect any time that was front loaded for vacation, sick or holiday time less any time that was used by the employee through that pay period, "but it's just a listing of what's currently in the system, not necessarily what is earned." On the left side of the pay stub, the information provided under the "earnings" column reflects any time that the employee was paid from the beginning of the year through the current paycheck. Pollack was paid for all accrued time that was left after unearned time was removed from his annual vacation.

On cross-examination Malewicz testified that nowhere in the Employee Handbook or the Manual does it say that vacation time accrues from pay period to pay period.

Testimony of Claimant Adam Pollack

Pollack was employed as a paramedic in the ambulance department starting in 2005 as a per diem employee. He attended a new employee orientation, where Mills spoke "about what he expected from us and as far as how we interacted with patients and family. Things like answering the phone, not letting the phone ring." The new per diem ambulance department employees did not attend the part of the orientation that discussed employee benefits, and they were taken to the ambulance base, where there was an internal orientation just for the new per diem workers in the ambulance department.

In October 2006, Pollack became a full time employee, but did not attend a second orientation. Pollack was given a copy of the Employee Handbook when he was hired. During Pollack's employment, Mills visited the ambulance base occasionally to discuss "state of the union" type matters. When Pollack became a full time employee, his supervisor, Madeline Fong, told him that he was entitled to 20 days of vacation to use during the year, and he would have to use it or lose it. No one ever explained to him that vacation pay was earned on a pay period by pay period basis, and neither the Employee Handbook nor the Manual state how vacation pay accrues. Until the hearing, Pollack never saw the January 7, 1999 memo explaining the front loading of vacation time and the pay period by pay period accrual.

Pollack took several medical leaves of absence, but his vacation time was never affected although deductions were made from his sick and holiday time. In January 2007, the hospital changed its practices regarding holiday and personal days, where they were combined into one "bucket" on employees' pay stubs, and that this time would be front loaded in the same manner as vacation and sick time. He understood that if he used sick days in excess of what he actually earned, or time that exceeded his personal or holiday accrual, they would be deducted from his vacation time. He did not think this was the case with vacation time.

Pollack's pay stub for the payroll period May 5-18, 2013 indicated that his holiday balance was 56 hours, his sick balance was 70 hours, and his vacation balance was 88.75 hours. Pollack "assumed that the accrued time was the time that was on [his] paycheck. [The hospital] did not list as non-accrued, it was time." At the May 13, 2013 meeting where the hospital announced the closing of the ambulance department pursuant to the Hunter Ambulance agreement, the employees were told that they were going to be paid for all the time that they had accrued. The employees present at the meeting assumed that their amount of accrued time was the amounts indicated on their pay stubs. Pollack was given a copy of the May 13, 2013 letter informing ambulance employees of their termination, which stated that all employees would receive their final paycheck reflecting all accrued vacation, personal, and holiday time. Pollack

believes that he is entitled to 88.75 hours of vacation, minus whatever vacation he used after the May 5-18, 2013 pay period.

Testimony of Senior Labor Standards Investigator J.C. Dacier

Senior Labor Standards Investigator Dacier has been a labor standards investigator for 26 years and was the investigator assigned to Pollack's claim. Dacier identified the documents that were in the DOL's investigative file, including instructions from his supervisor, Christine Anderson Lolly, stating that "nowhere in the policy does it state that vacation is earned per month and nowhere in the policy does it state that a prorated amount would be paid upon termination."

The petitioners were cited with a $500.00 record keeping violation because the wage statement that Pollack provided was different than the one the hospital provided which showed that the claimant had no time due to be paid out. The May 23, 2013 pay stub listed accruals owed to Pollack, but in the June 6, 2013 pay stub "The accruals are gone. They are gone but they weren't paid out in the meantime . . . . He gets a letter dated 13th of May explaining to him that, as a group, that they will get paid for accruals. Then he gets a pay stub for pay period 5/18/13 that lists the accruals. They're there. He gets the next pay stub for the subsequent pay period ending June 1, 2013, those accruals are not there and they are scratching it down to zero. That is what makes me think that some information was withheld [by] the attorney."

Dacier also imposed a 100% civil penalty to the wage order. The information that is taken into consideration when assessing the civil penalty includes "[p]ast history and the size of the underpayment, if there is some sort of inconsistency, like this, that could increase the amount of penalty." When asked if he agreed with the penalty, Dacier answered: "It's not my call. That's my instruction. I always write 100%." Liquidated damages were increased from 25% to 33% because petitioners' counsel "needlessly drew this case out longer."

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

Stephen Mills is an Employer

"Employer" is defined by Labor Law Article 6 as "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]). "Employed" includes permitted or suffered to work" (Labor Law § 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 U.S.C. § 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 FLSA. (*Matter of Yick Wing Chan v N.Y. State Indus. Bd. of Appeals*, 120 AD3d 1120 [1st Dept 2014]; *Bonito v Avalon Partners, Inc.*, 106 AD3d 625, 625 [1st Dept 2013];

Matter of Exceed Contracting Corp. v Indus. Bd. of Appeals, 126 AD3d 575 [1st Dept 2015]; *Chung v New Silver Palace Rest., Inc.*, 272 FSupp 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 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 economic reality based on a "totality of circumstances" (*Id.*).

With regard to the first *Herman* factor, it is undisputed that Mills, the president and CEO of the hospital, had the authority to hire and fire employees and exercised this authority. He signed the May 13, 2013 letter terminating the ambulance department employees, and Orlando testified that Mills has exercised his authority by hiring employees.

The record amply demonstrates that Mills supervised and controlled the conditions of employment, the second *Herman* factor. Mills approved and signed all of the relevant policies in the Manual that were the subject of this matter, including the policies on Vacation; Vacation Accrual; Vacation Accrual During Leaves of Absence; Family and Medical Leave; Sick Leave; Personal Days; Holidays; and Legal Holidays. The March 13, 2013 termination letter signed by Mills stated that: "Employees will receive payment from NYHQ for any accrued but unused vacation, holiday or personal time on the next regular payday after that date." Mills was likewise the signatory of the January 8, 2007 memo which indicates deductions would be taken from personal, holiday and sick time if an employee has exceeded his/her year to date personal or holiday accrual, but makes no mention of any deduction for vacations. Mills was present at new employee orientations, where he informed employees of his expectations regarding their interactions with patients and family, and he occasionally met with employees at the ambulance base. 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.' " (*Herman* [172 F3d at 139] [citations omitted]; *Irizarry v Catsimatidis*, 722 F3d 99 [2d Cir 2013], *cert denied*, 134 S Ct 1516 [2014]).

With regard to the third *Herman* factor, whether the individual determined the rates and methods of payment, Orlando testified that she determined employee pay rates. Orlando reported to Mills and worked under his supervision. The relevant sections of the Policy and Procedures Manual were all approved and signed by both Mills and Orlando. Whether Mills' authority was delegated to Orlando is not dispositive, since Mills retained overall authority. With regard to the

fourth factor, maintaining records, Mills was one of two signatories on employee paychecks and it was he who approved the relevant provisions of the Manual at issue here.

Individuals, such as Mills, can be liable as employers, along with the corporate employer with which they are associated, if the individuals also meet the statutory definition and the "economic reality" test. *See, e.g., Yick Wing Chan, supra*; *Bonito, supra*; *Herman, supra*; *Catsimatidis, supra*. In *Manning v Boston Regional Medical Center, Inc.*, 725 F3d 34, 47-50 (1st Cir 2013), the First Circuit Court of Appeals found specifically that a similar economic reality analysis could result in individual employer liability for a hospital's president and CEO. We find that the petitioners did not meet their burden of proof, and that it was reasonable and valid for the DOL to find that as a matter of economic reality, Mills was individually liable as an employer.

Claimant is Owed Vacation Pay

New York does not require employers to provide vacation pay to employees. However, when an employer does have a paid vacation leave policy, 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]). With respect to paid vacations, as with respect to other forms of wages, an employer's failure to keep required records entitles the DOL to make just and reasonable inferences and use other evidence to establish an employee's entitlement. (*See, e.g., Matter of Marchionda v IBA*, 119 AD3d 1342, 1343 [4th Dept 2014]). Labor Law § 198-c requires that the employer provide vacation pay or other wage supplements in accordance with the established terms of an agreement (*Gennes v Yellow Book of New York, Inc.*, 23 AD3d 520, 522 [2d Dept 2005]; *Matter of Glenville Gage Co. v State Indus. Bd. Of Appeals*, 52 NY2d 777 [1980], *aff'g* 70 AD2d 283 [3d Dept 1979]; *Matter of Jay Baranker and USI Services Group, Inc.*, PR 11-115 p. 5 [October 2, 2013]); *Matter of Center for Financial Planning, Inc.*, PR 06-059 [January 23, 2008]).

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 and Ace Audio Video, Inc. [T/A Ace Audio Visual Co. and Ace Communication]*, PR 08-055 [March 25, 2009]). Forfeiture provisions must be explicit (*Matter of Center for Financial Planning, Inc.*, PR 06-059 [January 23, 2008] *supra*; *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 issue in the present case is whether, as petitioners asserted, the hospital was entitled to deduct from the vacation balance reflected in Pollack's pay stubs money which, in petitioners' view, had been "front-loaded" but had not yet been earned. Neither the Employee Handbook nor the Manual states that such front-loaded vacation time will be forfeited or deducted from employees' entitlement on termination of employment. Indeed, neither the Handbook nor the Manual states that vacation time is accrued pay period by pay period. The Handbook states only that after six months continuous employment, "employees will receive a designated accrual of vacation time, appropriate to their job classification, reflecting six months prior time worked and future accrual up until the end of the calendar year. Thereafter, employees will be credited each January with a full year's vacation entitlement for their use during the calendar year."

Under these circumstances, petitioners' assertion that "front-loaded" vacation time shown as available on pay stubs was subject to forfeiture because it had not yet accrued is contradicted by principles discussed above. For example, in *Matter of Jay Baranker* and *Matter of Marc E. Hochlerin, supra*, the Board stated that absent a specific and explicit policy providing for forfeiture, accrued vacation pay must be paid notwithstanding termination of employment. In *Paroli*, the Appellate Division ruled that absent language so providing, "plaintiff was not required to show that he left in good standing in order to receive his accrued vacation pay."

Likewise, we found in *Matter of Knight Marketing Corporation of New York State (T/A Knight Marketing Corp. of New York)*, PR 09-200 (September 9, 2011), 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 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."

The Board rejected that petitioner's argument that although its Leave Policy did not explicitly state that flex days were owed to terminated employees on a *pro rata* basis, the policy "included an assumption of accrual" which was not explicitly stated. As we found: "The DOL validly and reasonably rejected this interpretation. Many vacation policies state that vacation is earned *pro rata* . . . . But policies that deem all vacation days to be earned and available at the commencement of the year are also legally enforceable" (internal citations omitted). As we further noted, "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" (internal quotations and citations omitted) (*Knight Marketing, supra*, at 5-6).

In the present case, the hospital's January 7, 1999 memo stated that the front loading of vacation pay was an advance and on termination, "if you have used vacation time beyond what you have earned up to your date of termination, payroll will calculate the amount of vacation time you normally would have been entitled to and will deduct it from any moneys due you." However, it was undisputed that the hospital did not hire Pollack until 2005, the January 1999 memo was never re-sent to employees, neither the Employee Handbook nor the Manual includes the statement in the memo, and Pollack was never told about the policy. We credit his testimony that his new employee orientation in 2005 did not include discussion of benefits because per diem ambulance employees, who were not covered by the benefits policy, were instead taken to the ambulance base for an internal orientation just for them; that he did not attend a new employee orientation when hired as a full time employee in 2006; and that the first time he saw the January 7, 1999 memo was at the hearing. Not only do the Employee Handbook and Manual not state that termination pay will include a deduction for front-loaded vacation, the Handbook states specifically that terminal pay will reflect "all accrued but unused vacation, holiday or personal time, less any *sick* time taken in excess of the accrual," (emphasis supplied), with no mention of any *vacation* forfeiture or deduction.

As we noted in *Knight*, PR 09-200 at 6, "An obvious purpose of Labor Law § 195 (5), implemented by the Board's rulings in *Marc E. Hochlerin* and *Center for Financial Planning*, is to make sure that employees understand their rights and are not suddenly surprised to learn that

rights do not exist just when they are needed most, including on termination from employment." Here, this statutory policy strongly supports the idea that it was valid and reasonable for the DOL to enforce the policy communicated to and understood by Pollack, including in the Employee Handbook and Manual, regardless of a memo distributed once to employees, over six years before his hiring and fourteen years before his termination. Even the hospital's communications to employees in May 2013, after it was decided to out-source ambulance work, did not state that the vacation "balance" reflected in employees' pay stubs would be reduced when they were paid "accrued but unused vacation" following termination. Regardless of hospital officials' understanding of the policy, in the absence of a specific explanation in the Employee Handbook or Manual or otherwise communicated to Pollack, the hospital failed to prove that his vacation balance was subject to forfeiture or reduction at the time of his termination or that the DOL's issuance of the order was unreasonable or invalid.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then 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." We therefore affirm the interest imposed in the supplemental wage order.

The Civil Penalty in the Supplemental Wage Order Is Revoked

The supplemental wage order assessed a civil penalty in the amount of 100% of the vacation pay due. Respondent provided no explanation for the penalty other than "if there is some sort of inconsistency, like this, it could increase the amount of the penalty." The inconsistency referred to, between Pollack's pay stub and the ADP-generated record, however, resulted from application of the policy stated in the hospital's January 7, 1999 memo, and not as a result of bad faith. When asked if he agreed with the 100% penalty, Senior LSI Dacier testified that "It's not my call . . . . I always write 100%." We find that it is not reasonable or valid to impose a penalty on such a basis.

The Liquidated Damages in the Supplemental Wage Order Are Revoked

Labor Law § 198 (1-a) provides that when any employee is paid less than the wage to which he is entitled, the Commissioner may bring administrative action against the employer to collect such claim, and the employer shall be required to pay the full amount of the underpayment "and unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages. Such damages shall not exceed one hundred percent of the total amount of wages found to be due." We find that petitioners demonstrated a good faith basis for believing that their underpayment was in compliance with the law, namely, their reliance on the January 7, 1999 memo, their understanding of the vacation policy and the fact that, as testified by Orlando, no previous confusion had arisen, and we revoke the assessment of liquidated damages in the supplemental wage order.

The Penalty Order Is Revoked

The penalty order was based on petitioners' failure to keep and/or furnish true and accurate payroll records for the period January 1, 2013 through June 16, 2013, based on the discrepancy between the pay stub issued to Pollack reflecting his "front loaded" vacation pay and the ADP-generated record reflecting vacation pay payable without risk of forfeiture according to the hospital's understanding of its vacation policy. We have found for reasons stated above that Pollack was entitled to rely on the pay stub. We find that there is no evidence that the discrepancy resulted from false or inaccurate records or, as Dacier testified, "that some information was withheld," and accordingly, we revoke the penalty order.

NOW THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The supplemental wage order is modified to designate the correct name of the corporate employer, The New York Hospital Medical Center of Queens, and to revoke the civil penalty and liquidated damages, and as so modified, is affirmed. The order is remanded to the DOL to calculate the interest owed; 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
At Albany, New York

J. Christopher Meagher, Member
At Albany, New York

LaMarr J. Jackson, Member
At Rochester, New York

Michael A. Arcuri, Member
At Syracuse, New York

Dated and signed by the Members
of the Industrial Board of Appeals
on July 22, 2015.

The Penalty Order Is Revoked

The penalty order was based on petitioners' failure to keep and/or furnish true and accurate payroll records for the period January 1, 2013 through June 16, 2013, based on the discrepancy between the pay stub issued to Pollack reflecting his "front loaded" vacation pay and the ADP-generated record reflecting vacation pay payable without risk of forfeiture according to the hospital's understanding of its vacation policy. We have found for reasons stated above that Pollack was entitled to rely on the pay stub. We find that there is no evidence that the discrepancy resulted from false or inaccurate records or, as Dacier testified, "that some information was withheld," and accordingly, we revoke the penalty order.

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2. The penalty order is revoked; and

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

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NOW THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The supplemental wage order is modified to designate the correct name of the corporate employer, The New York Hospital Medical Center of Queens, and to revoke the civil penalty and liquidated damages, and as so modified, is affirmed. The order is remanded to the DOL to calculate the interest owed; and

2. The penalty order is revoked; and

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

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