STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: CARLOS ESPINOZA AND K&P CLEANING CO., Petitioners, To Review Under Section 101 of the Labor Law: an Order to Comply under Article 6 and an Order under Article 19 of the Labor Law, both dated November 12, 2009, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 09-339 RESOLUTION OF DECISION

APPEARANCES

Carlos Espinoza, petitioner pro se, and for K&P Cleaning Co.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Larissa C. Bates of counsel), for respondent.

WITNESSES

Carlos Espinoza, for petitioners;

Neil Benjamin, Labor Standards Investigator, for respondent.

WHEREAS:

On November 20, 2009, Carlos Espinoza and K&P Cleaning Company, Inc. (Petitioners) filed a Petition with the New York State Industrial Board of Appeals (Board), pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Board Rules) (12 NYCRR Part 66), seeking review of two Orders to Comply that the Commissioner of Labor (Commissioner, Respondent or DOL) issued against them on November 12, 2009. The first Order under Article 6 of the Labor Law (Wage Order) finds that Petitioners failed to pay wages to Ana Martinez for the period December 24, 2008 to February 9, 2009, and demands payment of $810.00 in wages; interest at the rate of 16%,

calculated through the date of the Wage Order in the amount of $98.71, and a 100% civil penalty of $810.00, for a total amount due as of the Order's date of $1,718.71. The second Order under Article 19 of the Labor Law (Penalty Order) finds that the Petitioners failed to keep and/or furnish true and accurate payroll records for the period from on or about December 24, 2008 through February 7, 2009 in violation of Article 19, and demands payment of $500.00.

The *pro se* Petition alleges that the Claimant was paid in full for work performed during the relevant period. The Respondent filed an Answer on January 4, 2010.

Upon notice to the parties, a hearing was held on January 6, 2011 in White Plains, New York before Jean Grumet, 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 make closing arguments.

I. SUMMARY OF EVIDENCE

Testimony of Carlos Espinoza

Until November 2009, K&P was a cleaning company headquartered in Poughkeepsie, New York, with 26 or 27 employees, servicing local retail stores of national firms. Espinoza was K&P's owner. K&P was directly hired, as a subcontractor, by Whelans International (Whelans), which hired K&P to service a Burlington Coat Factory store in Kingston. K&P, in turn, hired Claimant to clean this store. Claimant worked a 12-hour-per-week schedule (three hours per day, four days per week) totaling 24 hours per biweekly pay period.

K&P lost its contract to clean the Burlington Coat Factory store on January 31, 2009,[1] when Whelans telephoned Espinoza to state that K&P could no longer work there. Whelans never provided written confirmation, only the phone call. Petitioners paid Claimant for all work hours through January 31st. Thereafter, even if she made another arrangement to continue cleaning the store, K&P, having lost the contract, no longer employed her.

Bank records submitted by Espinoza show checks paid by K&P to Claimant including the following:

Check #	Date of Check	Amount of Check	Date Cashed
6298	12/11/08	$186.99	1/26/09
6316	12/29/08	$210.75	1/26/09
6334	1/8/09	$186.99	1/26/09

[1] In his testimony, Espinoza twice gave the date when K&P lost the contract as December 31st, but later clarified that it was January 31st and that Claimant worked in January 2009.

Espinoza also submitted a record of a 2/5/09 check to Claimant, check # 6374,[2] indicating that that check was for pay period 1/19/09 to 2/1/09 in the gross amount of $216.00 with $29.01 withheld for a net amount of $186.99. Espinoza testified that Claimant cashed this check, but did not bring the February bank statement or a copy of the cancelled check to the hearing.

In addition, Espinoza submitted a payroll journal recording the following with respect to Claimant for the following biweekly payroll periods:

Period End	Check Date	Gross Pay	Net Pay	Check Number
12/7/08	12/11/08	$216.00	$186.99	6298
12/21/08	12/29/08	$216.00 + $29.00[3]	$210.75	6316
1/4/09	1/8/09	$216.00	$186.99	6334
1/18/09	1/22/09	$216.00	$186.99	63 (illegible)
2/1/09	2/5/09	$216.00	$186.99	6374

No payroll journal for the period ending February 15, 2009 was submitted. Beyond handwritten notations that Claimant had 24 "reg" hours in a biweekly period,[4] the payroll journal does not record her daily or weekly hours. Espinoza testified that the only record of those hours was Claimant's time sheet, which showed her time in and time out each work day and was approved by the store manager. He stated, however, that Whelan's retained these time sheets and its successor company refused to provide Petitioners with a copy.

Petitioners stipulated that a time sheet for December 2008 which Claimant submitted to the DOL when filing her claim correctly shows her work hours for that month. However, Espinoza testified that time sheets for the months of January and February 2009, submitted to the DOL by Claimant, were wrong, and that Claimant did not work for K&P in February 2009 at all even though she submitted a time sheet showing hours worked through February 7th. According to Espinoza, whatever hours Claimant recorded on time sheets and had signed by the store manager, she worked only until January 31st and was correctly paid for all hours worked.

Testimony of Neil Benjamin

Labor Standards Investigator Neil Benjamin testified that the Claimant filed an April 1, 2009 claim for unpaid wages stating that she worked for Petitioners for $9.00 per hour from July 24, 2006 to February 7, 2009, and was not paid in full for the period December 24, 2008 through February 7, 2009. The sworn claim form states as Claimant's reason for

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[2] Although Espinoza initially described the document as "a copy of the check," it is a copy of a pay stub or similar payroll document, not of a check. Espinoza later testified that he did not have a copy of the check.

[3] The basis for the extra, separately recorded $29.00 payment is not shown in the payroll journal.

[4] Unlike the payroll journals submitted by Petitioners to the DOL during the investigation, which do not contain handwritten notations, each payroll journal page submitted into evidence by Espinoza includes a handwritten notation that Claimant worked 24 "Reg Hours," and the pages beginning with the period ending 12/21 also include handwritten notations that her rate was $9.00. The page for the period ending 12/7 has the $9.00 figure printed (as figures for both the rates and the hours of about half the approximately 15 other workers are on all pages). Except for the handwritten notations that Claimant had 24 regular hours, her daily or weekly hours are not recorded in the payroll journal.

quitting, discharge or layoff that "Burlington Coat Factory now has a different company do their cleaning."

In her claim form, Claimant stated that she worked a total of 27 hours on six days during the pay period ending January 4, 2009, but was paid gross wages of $216.00 instead of $243.00. She further stated that during the pay periods ending January 18, February 1 and February 15, 2009, she respectively worked totals of 48, 48 and 15 hours on eight, eight and three days, entitling her to total gross wages of $999.00 at her $9.00 per hour rate; but was paid only $216.00, for the first of the three pay periods, the one ending January 18th. She was not paid at all for the payroll periods ending February 1 and February 15, 2009. Thus, Claimant was owed a total of $810.00.

When filing her claim form, Claimant also submitted to the DOL copies of time sheets for December, January and February, headed "Burlington Coat Factory - Daily Checklist - Store management fills out daily with crew" that are consistent with the hours she claimed. For example, the January time sheet recorded Claimant as working six hours per day (not three hours per day as had been true for most days in December) on 18 days. The February time sheet recorded her as working three hours on February 4 and six hours each on February 6 and 7.

Claimant also submitted to the DOL pay records (similar in format to the record of a 2/5/09 check submitted by Espinoza) for pay periods ending 1/4/09 (check # 6334 dated 1/8/09) and 1/18/09 (check # 6352 dated 1/22/09). Each shows a gross amount of $216.00 with withholdings totaling $29.01.

On April 23 and again on May 15, 2009 the DOL wrote to Petitioners informing them of the claim for a total of $810.00 in unpaid wages and requesting that Petitioners either remit payment or provide an explanation of why moneys were not due and payable. In response, Petitioners submitted only pages from the payroll journal, which stated only Claimant's gross and net earnings for a pay period, without any record of her hours worked or (in most cases) rate of pay.[5] On July 21, 2009 the DOL wrote to Petitioners stating that the records submitted were insufficient and that failure to remit payment of the wages owed or submit documentary evidence disproving the claim, such as time records and copies of cancelled checks, would result in issuance of an Order to Comply. Nothing further was received from Petitioners.

II. STANDARD OF REVIEW AND BURDEN OF PROOF

In general, when a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. The petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in [the petition] shall be deemed waived" (Labor Law § 101). The Board is required to presume that an order of the Commissioner is valid (Labor Law § 103). If the Board finds that the "order, or any part thereof, is invalid or unreasonable it shall revoke, amend or

[5] The payroll journal pages submitted to the DOL by Petitioners during the DOL's investigation did not include the handwritten notations noted in the summary of Espinoza's testimony, *see* n. 3 above.

modify the same" (Labor Law § 101(3)).

Pursuant to Rule 65.30 of the Board's Rules of Procedure and Practice (Rules) (12 NYCRR § 65.30): "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioners to prove that the Orders were invalid or unreasonable.

An employer's obligation to keep adequate employment records is found in Labor Law § 195 as well as in the New York Code of Rules and Regulations (NYCRR). Specifically, Title 12 of the NYCRR, § 142-2.6 provides, in pertinent part:

> "(a) Every employer shall establish, maintain and preserve for not less than six years, weekly payroll records which shall show for each employee:
> (1) name and address;
> (2) social security number;
> (3) the wage rate;
> (4) the number of hours worked daily and weekly;
> (5) when a piece-rate method of payment is used, the number of units produced daily and weekly;
> (6) the amount of gross wages;
> (7) deductions from gross wages;
> (8) allowances, if any, claimed as part of the minimum wage;
> (9) net wages paid; and
> (10) student classification."
> . . .
> "(d) Employers...shall make such records...available upon request of the commissioner at the place of employment."

An employer's failure to keep adequate records does not bar employees from filing wage complaints. Where employee complaints demonstrate a violation of the Labor Law, DOL may credit the complaint's assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of proving that the disputed wages were paid. (Labor Law § 196-a; *Angello* v. *National Finance Corp.,* 1 AD3d 850 [3d Dept 2003]). As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp.* v *Hartnett,* 156 AD2d 818, 821 (3rd Dept 1989), "[w]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer. "

In *Anderson* v *Mt. Clemens Pottery Co.,* 328 U.S. 680, 687-88 (1949), superseded on other grounds by statute, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

> "[W]here the employer's records are inaccurate or inadequate.... [t]he solution.. .is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of

> uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act."

Citing to *Anderson* v *Mt. Clemens,* the Appellate Division in *Mid-Hudson Pam Corp., supra,* agreed:

> "The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee.... Were we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute. That result should not pertain here."

The Board follows the precedent set in *Mid-Hudson Pam Corp.* that where required employer records are unavailable, DOL may use "the best available evidence" to estimate back wages due and "shift the burden of negating the reasonableness of the Commissioner's calculations to the employer," with "the amount and extent of underpayment... a matter of just and reasonable inference." *See, e.g., Matter of Abdul Wahid*, PR 08-005 [Nov. 17, 2009]; *Matter of Dueck Sun Kim Youn*, PR 08-172 [Mar. 24, 2010].

III. FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to Board Rule 65.39 (12 NYCRR § 65.39). For the reasons below, we find that the Petitioners did not meet their burdens of proving that Claimant was paid for all hours worked and that they maintained legally required records and we affirm both Orders.

Petitioners did not preserve and submit for inspection by the Commissioner records of Claimant's wage rate,[6] number of hours worked daily and weekly and amount of gross wages. As a result, the DOL was required to calculate wages due to Claimant "by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer." *Mid-Hudson Pam Corp., supra.* Claimant, by contrast, did submit to the DOL copies of her time sheets, which support her claim that Petitioners failed to pay her a total of $810.00 for 90 hours worked during the three pay periods ending January 18, February 1 and February 15, 2009. We find that the DOL validly and reasonably relied on this evidence.

Petitioners provided no adequate basis to reject the evidence: only Espinoza's own testimony, completely unsupported by any documentary proof, that he received a telephone call terminating K&P's contract, and speculation that the store manager signed time sheets exaggerating Claimant's hours out of "friendship." Espinoza did not substantiate how he supposedly knew the hours validated by the store manager were exaggerated. On the

[6] It is undisputed, however, that Claimant's rate was $9.00 per hour.

contrary, he testified that the sign-in sheet approved by the manager was "the only [time] records we have." The payroll journal submitted by Petitioners has no specifics of hours worked, only a handwritten 24-hour-per-pay-period total figure that is included only in the version of the journal which Petitioners submitted at the hearing, not the version of the same document which Petitioners had earlier submitted to the DOL.

Petitioners also submitted no proof that Claimant ever received the last two paychecks recorded in the payroll journal, for pay periods ending 1/18 and 2/1/09, nor did Petitioners submit daily and weekly time sheets or any other records to support their contention that Claimant did not work during the period ending 2/15/09 and could have provided a basis to disprove or question the authenticity or accuracy of Claimant's documents. *Matter of Davinder S. Makan,* PR 10-081 (October 11, 2011). While Espinoza stated he could submit proof that Claimant cashed the 1/22 and 2/5 paychecks "any other time," but "just didn't bring it," the Notice of Hearing put Petitioners on notice that "This is your opportunity to prove your case" and "All evidence that you wish the Board to consider must be presented at this hearing." Claimant herself produced a record confirming her receipt of the 1/22 paycheck but denied receiving the 2/5 one, and stated that she was not paid in full for hours worked during the pay periods ending January 4 and January 18.

In light of the absence of required records from the employer, the DOL was entitled to accept Claimant's sworn claim. We further find that in the absence of records which Petitioners were required to keep, Espinoza's testimony that a January 31st telephone call terminated K&P's contract was insufficient to disprove the correctness of time sheets submitted to the DOL by Claimant. Nor could his claim that the Whelans contract ended January 31st explain why Claimant was not paid for work during the three prior payroll periods. In this respect, Petitioners failed to demonstrate that Claimant was paid at all for the pay period ending February 1st, or that her time sheets for the two prior pay periods were inaccurate. While Petitioners introduced into evidence a pay record dated 2/5/09 stated to be for the period ending February 1st and a payroll journal page referring to the payment, no cancelled check or bank statement proving that Claimant actually received and cashed this check was introduced, in contrast to Petitioners' introduction of bank records that confirms payment to her of earlier checks. Espinoza's statement that he could have produced a subsequent bank statement but did not bring it is insufficient to meet his burden. In addition to the Notice of Hearing stating that all evidence must be presented at the hearing, the DOL's July 21, 2009 letter to Petitioners had specifically sought "copies of the cancelled checks (front and back) demonstrating payment."

Under these circumstances, it was valid and reasonable for the DOL to accept the records furnished by Claimant as a basis for its calculation of underpayment and we affirm both the Wage Order and the Penalty Order.

The Imposition of Civil Penalties in the Wage Order and the Penalty Order is affirmed

Labor Law § 218 provides that in assessing the amount of a penalty, the commissioner "shall give due consideration" to the following factors: (1) the size of the employer's business; (2) the good faith of the employer; (3) the gravity of the violation; (4) the history of previous violations; and (5) in the case of violations involving wages, benefits or supplements, the failure to comply with recordkeeping or other non-wage requirements. The Board finds that the

considerations and computations that the Commissioner was required to make in connection with the imposition of the civil penalty amounts are reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Orders are affirmed;

2. The Petition is denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
January 30, 2012.

considerations and computations that the Commissioner was required to make in connection with the imposition of the civil penalty amounts are reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Orders are affirmed;

2. The Petition is denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
January 30, 2012.