STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: STEVEN KLEIN AND STEVEN KLEIN, M.D., P.C., Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law, and an Order under Articles 6 and 19 of the Labor Law, both dated November 13, 2009, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 10-004 RESOLUTION OF DECISION

APPEARANCES

Steven Klein, petitioner pro se and for Steven Klein, M.D., P.C.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin T. Garry of counsel), for respondent.

WITNESSES

Steven Klein, for petitioners.

Janet Keenan, claimant, and Angel Medina, Labor Standards Investigator, for respondent.

WHEREAS:

On January 7, 2010, petitioners Steven Klein and Steven Klein, M.D., P.C., (Klein or petitioner) 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 or Respondent) issued on November 13, 2009. The first Order is an Order to Comply with Article 6 of the Labor Law (Supplemental Wage Order), which finds that petitioner failed to pay vacation wages to claimants Janet Keenan and Virginia Maier in the amount of $1,750.00, interest at the

rate of 16% calculated to the date of the order in the amount of $222.82, and a civil penalty in the amount of $1,750.00 (100%) for a total amount due of $3,722.82.

The second Order is an Order to Comply under Articles 6 and 19 of the Labor Law (Penalty Order), for petitioner's failure to notify employees in writing or to post notice of hours and/or fringe benefits policy as mandated under §195.5 of the Labor Law (Count 1) and for the failure to keep and/or furnish accurate payroll records as required under Labor Law §661 as supplemented by the Minimum Wage Order for Miscellaneous Industries, 12 NYCRR 142-2.6 (Count 2), and demands payment of $500.00 for each violation for a total of $1,000.

The petition challenges the Supplemental Wage Order as unreasonable or invalid on the grounds that claimants were not owed any vacation pay under petitioner's policy which provides that no vacation is due after an employee quits or is terminated for any reason. Petitioner also challenges the Penalty Order by alleging that petitioner kept all of the required payroll records and had a written vacation policy available for review by all employees.

Upon notice to the parties a hearing was held on June 30, 2011, in Old Westbury, New York, before Jean Grumet, Esq., Board Member, and continued on September 27, 2011 and November 29, 2011 before Anne P. Stevason, Esq., Chairperson of the Board. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, make statements relevant to the issues, and make closing arguments.

SUMMARY OF THE EVIDENCE

Petitioner's evidence

Petitioner Dr. Steven Klein testified that he owned and operated a small medical office which employed both claimants, Janet Keenan and Virginia Maier. Keenan earned $15.25 per hour and Maier earned $16.00 per hour. The office had a vacation policy which was discussed with each employee upon hiring, was posted in the lunch room, and was contained in each employee's file, which was available for them to look at at any time. The vacation policy, which was in effect since 1988, was put into writing on January 2, 2005 and provided, in part:

> "Please note, you will forfeit all paid vacation time and paid holiday time if you are terminated for any reason before you have taken your holiday or paid vacation time in that year. If you decide to quit your job or are terminated by the office manager or Dr Klein for any reason, then this will apply. There are no circumstances where this would not apply."

Since Keenan was dismissed from her job and Maier quit her job, both claimants forfeited any unused vacation pay pursuant to the policy. Klein also produced two affidavits of former employees which stated that they were informed of the vacation policy and understood that if they quit or lost their job that they would not get any unused vacation pay. They also said that everyone was instructed to sign the policy. In

addition, Klein testified that there was a meeting held after a part-time employee left and received no vacation pay, where it was explained again that vacation is forfeited upon termination.

Also introduced into evidence by the petitioner, were the personnel files of Keenan and Maier. In each of the files was a copy of the written vacation policy dated January 2, 2005 but neither copy was signed by either claimant. Also included in the files was a record of each employee's time used for sick leave, personal leave and vacation.

Klein testified that when DOL asked him to produce his payroll records, he requested that he be able to produce a representative time period instead of all of them, since the records that he had were too numerous. He testified that he was given this permission and therefore, only produced the records for two weeks. When notified at the hearing that he was required to produce all records, Klein produced the records at the third day of hearing which were reviewed by DOL and found to be sufficient. DOL agreed that Klein did maintain the required payroll records.

Klein also testified that even if the claimants were due vacation pay, they would only be due their pro rata share of two weeks since neither of them completed a full calendar year before leaving and vacation was determined by calendar year. Keenan left in August 2008 and Maier left in April 2009.

Respondent's evidence

Claimant Keenan testified that when she was hired she was told that she would get two weeks or 80 hours vacation per year. She was never provided with a written vacation policy and had never seen the policy introduced by petitioner. She also testified that it was not posted anywhere in the office. She filed a claim with DOL on September 27, 2008 after she received her final check and was told that she would not be getting any vacation pay. Since her final check stub showed that she was paid $366.00 in vacation pay for the year to date, which represented 24 hours of vacation, she was still entitled to 56 hours of vacation at her hourly rate of $15.25 or $854.00. Her personnel file indicates that Keenan has 97.60 hours remaining, which includes time which accrued the prior year when Keenan was hired.

Maier did not testify but had filed a claim with DOL for her vacation pay on May 7, 2009. Maier claimed 7 days or 56 hours of vacation since she had already taken 3 days in 2009. At $16.00 per hour, Maier claimed $896.00 in vacation pay. Maier's personnel file indicates that Maier had 64 vacation hours remaining.

Labor Standards Investigator Angel Medina testified concerning the contents of the DOL investigative file on this case. Medina was not the investigator who investigated the case and had no knowledge of the case other than what was in the file. Medina did testify at hearing, however, that the payroll records produced by petitioner at hearing were sufficient under the law. Copies of correspondence between DOL and Klein were introduced into evidence.

GOVERNING LAW

Standard of Review and Burden of Proof

The Labor Law provides that 'any person . . . may Petition the board for a review of the validity or reasonableness of any . . . order made by the [C]ommissioner under the provisions of this chapter" Labor Law 101 § [1]).

A petition filed with the Board that challenges the validity or reasonableness of an order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). It is the petitioner's burden at the hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (State Administrative Procedures Act § 306; Board Rules of Procedure and Practice § 65.30 at 12 NYCRR § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it"]; *Angelo v Natl. Fin. Corp.,* 1 AD 3d 850, 854 [3d Dept 2003]). It is therefore petitioner's burden to prove, by a preponderance of the evidence, that vacation pay, is not due and owing. It is also petitioner's burden to prove, by a preponderance of evidence, that the Penalty Order is invalid or unreasonable.

DISCUSSION AND FINDINGS

The Order's Finding that Petitioners Owe Vacation Pay to Claimant Keenan is Reasonable and Valid.

New York does not require employers to provide vacation pay to employees. However, when an employer establishes a paid vacation leave policy for its employees, Labor Law § 198-c requires that the employer provide this benefit in accordance with the terms of the established leave policy *(Gennes v Yellow Book of New York, Inc.,* 23 AD3d 520, 521 [2nd Dept 2005]; *Matter of Glenville Gage Co., v State Indus. Bd. of Appeals,* 52 NY2d 777 [1980], *affg* 70 AD2d 283 [3rd Dept 1979]' *In the Matter of the Petition of Nathan Godfrey [TIA A.S.U.],* PR 09-024 [January 27, 2010]; *In the Matter of the Petition of Center for Fin. Planning, Inc.,* PR 09-059 [January 28, 2008]; *In the Matter of the Petition of Joel D. Fairbank and 2nd Nature, LLC,* PR 09-052 [April 27, 2011]).

Labor Law § 195 (5) requires an employer to "notify his employees in writing or by publicly posting the employer's policy on . . . vacation," and Labor Law § 198-c requires "any employer who is party to an agreement to pay or provide benefits . . . [to pay those benefits] within thirty days after such payments are required to be made."

Forfeiture of vacation pay upon termination must be specified in the employer's vacation policy or in an agreement with the employee *(Matter of Petition of Marc E. Hochlerin and Ace Audio Video, Inc. [T/A Ace Audio Visual Co., and Ace Communication]* PR 08-055 [March 25, 2009]), and forfeiture provisions must be explicit (*Fin. Planning, Inc, Supra.*); *See also, Paroli v Dutchess County,* 292 AD2d 513 [2nd Dept 2002] [an employee was entitled to vacation pay upon termination as the employer's benefit plan contained no qualifying language entitling employees to the benefit only if they were in "good standing"]).

Dr. Klein testified that the written vacation policy was shown to claimants when they were hired, at quarterly meetings where they were asked to sign and return the policies, and it was also posted in the lunchroom. Keenan testified that she was never shown a written vacation policy, never signed a policy and never saw one posted. The hearing was the first time that Dr. Klein mentioned that the written policy was also posted. There had been two previous letters to DOL explaining that the policy was written and provided to the claimants and contained in their personnel files which was available to them but no mention was made of posting. In addition, the two affidavits produced by petitioner make no mention of posting. Although Dr. Klein stated that everyone was asked to sign a copy of the policy, no signed copy was produced for either Keenan or Maier. Although Dr. Klein may have shown the written policy to others, there is no evidence to prove that Keenan was given a written policy other than Klein's general testimony about procedure, and the hearsay affidavit. Given Keenan's specific testimony regarding her situation, we find that Keenan did not see the written policy and therefore, did not forfeit her vacation upon termination.

Maier did not testify at the hearing. Therefore, Dr. Klein's unrebutted testimony that he showed the written policy to Maier is accepted. Pursuant to the written policy produced by Dr. Klein, it is clear that vacation pay is forfeited upon termination. Therefore, no wages are owed to Maier and that portion of the Wage Order is revoked.

The Civil Penalty is Reasonable and Valid.

We find that the 100% Civil Penalty is reasonable and valid, but that the amount assessed must be modified based on the reduction in the amount of benefit payments due.

The Penalty Order is Modified to Revoke the Payroll Record Penalty and to Affirm the Penalty for Failure to Notify Employees in Writing or to Post Vacation Policy.

At the hearing it was agreed that Dr. Klein maintained sufficient payroll records to be in compliance with the Labor Law. DOL argued that since Dr. Klein did not furnish the payroll records as required, that he should still be assessed the penalty. However, since the investigator who investigated the case did not testify at the hearing, we have Dr. Klein's unrebutted and credible testimony that he was told that he could furnish a representative sampling of his records. When requested to provide all of the records at hearing, Dr. Klein produced the records. We, therefore, revoke the $500 penalty for failure to have payroll records.

We affirm the penalty for failure to notify employees in writing or to post the vacation policy since Keenan testified that she was never shown the written policy and it was not posted. No mention of a posting was made prior to hearing either by Dr. Klein or in either of the affidavits that he produced.

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NOW , THEREFORE IT IS HEREBY RESOLVED THAT:

1. The Order to Comply under Article 6 of the Labor Law dated November 13, 2009 (Supplemental Wage Order) is modified to reduce the amount of vacation wages to $854.00 plus interest and penalty prorated based on the modified figure.

2. The Order to Comply Under Article 6 of the Labor Law (Penalty Order) is revoked for petitioners' failure to keep and/or furnish accurate payroll records and affirmed for the failure to notify employees in writing or to post notice of hours and/or fringe benefits policy and therefore, reduced to $500.

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

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Date and signed in the Office of
the Industrial Board of Appeals
at New York, New York on
October 17, 2012.

1. The Order to Comply under Article 6 of the Labor Law dated November 13, 2009 (Supplemental Wage Order) is modified to reduce the amount of vacation wages to $854.00 plus interest and penalty prorated based on the modified figure.

2. The Order to Comply Under Article 6 of the Labor Law (Penalty Order) is revoked for petitioners' failure to keep and/or furnish accurate payroll records and affirmed for the failure to notify employees in writing or to post notice of hours and/or fringe benefits policy and therefore, reduced to $500.

3. The petition for review by, and the same hereby is, otherwise 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
October 17, 2012.